Supreme Court, U.S.
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In the
Supreme Court of the United States

LINDA ANITA CARTY,

Petitioner,

v.

RICK THALER, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Capital Case

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE QUESTIONS PRESENTED FOR REVIEW

In *Bell v. Kelly*, 128 S. Ct. 2108 (2008), this Court granted *certiorari* to address the correct method for giving effect to evidence properly considered for the first time in federal habeas corpus proceedings within the framework of the Antiterrorism and Effective Death Penalty Act, which affords some deference to state court decisions reasonably made on the evidence before the state court. The parties in *Bell* noted a lower court split over whether to accord de novo review or apply AEDPA's deferential provisions. This case squarely presents, *inter alia*, the issue this Court sought to address in *Bell*:

1. Did the Fifth Circuit err when, confronted with the *Bell* conundrum, it adopted the novel approach of carving Carty's claim of ineffective assistance into subclaims, applying different standards of review to the fragments of her claim and denying them seriatim without ever considering de novo the totality of her claim for relief?

2. Did the Fifth Circuit err in applying *Strickland v. Washington*, 466 U.S. 668 (1984)—which requires evaluating the totality of the postconviction record when—(A) it assessed sentencing prejudice without considering the impact of trial counsel's culpability phase error, in conflict with three courts of appeals, and (B) it refused to cumulate all the categories of mitigating evidence?

3. Should the Fifth Circuit's decision simply be reversed and remanded for further consideration in light of *Porter v. McCollum*, 130 S. Ct. 447 (2009) (per curiam), in which this Court implicitly held that courts must

cumulate all punishment phase errors when assessing sentencing prejudice?

4. Did the Fifth Circuit's conviction prejudice assessment violate *Strickland* where the Fifth Circuit improperly relied on *Lockhart v. Fretwell*, 506 U.S. 364 (1993), and thereby imposed a higher standard than *Strickland* requires?

5. Does the Fifth Circuit's unusual practice—followed in Carty's case—of carving a unitary claim of ineffective assistance of counsel into multiple distinct subclaims, and then deciding whether each such truncated subclaim justifies issuance of a Certificate of Appealability, violate 28 U.S.C. § 2253, which makes a COA available to a petitioner who makes a "substantial showing of the denial of a constitutional right," and *Strickland*, which requires assessing the cumulative impact of counsel's errors?

LIST OF PARTIES TO THE PROCEEDING (SUP. CT. R. 14.1(b)) AND CORPORATE DISCLOSURE STATEMENT (SUP. CT. R. 29.6)

The caption of this case contains the names of all parties to this proceeding, *i.e.*, Linda Anita Carty (Petitioner) and Rick Thaler, Director of the Texas Department of Criminal Justice, Correctional Institutions Division (Respondent).

This Petition for Writ of Certiorari is not filed by or on behalf of a nongovernmental corporation. *See* SUP. CT. R. 29.6.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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PETITION FOR A WRIT OF CERTIORARI

Texas death row prisoner LINDA ANITA CARTY, by counsel, respectfully asks this Court to grant a writ of certiorari to review the judgment of the United State Court of Appeals for the Fifth Circuit denying habeas corpus relief.

OPINIONS BELOW

The Fifth Circuit panel's opinion, *Carty v. Thaler*, 583 F.3d 244 (5th Cir. 2009), is attached as Appendix A. The Fifth Circuit panel's earlier opinion denying Carty's

Motion for Additional COA is attached as Appendix B. The order denying panel rehearing is attached as Appendix C. The relevant decisions of the United States District Court for the Southern District of Texas (orders denying relief and partially granting COA) are attached as Appendices D and E, respectively.

JURISDICTION

The Fifth Circuit entered judgment on September 17, 2009, and denied panel rehearing on October 27, 2009. This Petition is timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment guarantee of counsel, applicable against the States through the Fourteenth Amendment's due process clause, and 28 U.S.C. §§ 2253 and 2254; they read, in relevant part:

U.S. CONST. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

U.S. CONST. amend. XIV

> Section 1. . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Title 28, U.S.C. § 2253

> (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an

> appeal may not be taken to the court of appeals from—
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court
>
> . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Title 28, U.S.C. § 2254

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

This death penalty case is unique because the deficiency of trial counsel's performance is uncontested. The Fifth Circuit held that Carty's representation fell below the level of objective reasonableness required by *Strickland v. Washington*, 466 U.S. 668 (1984). *See Carty*, 583 F.3d at 259, 265. Even the State admitted when questioned about counsel's failure to contact Carty's husband: "[I]t was an oversight and *we certainly don't defend that*. (5th Cir. Oral Arg't 34:26 (emphasis added).) The record verifies that counsel failed at almost every stage to provide constitutionally effective representation.

This is not a matter of second-guessing strategic decisions made during trial because counsel performed *no investigation* on which a legitimate trial strategy could be based. First, counsel never even spoke to Carty's husband, José Corona, who both the State and the Fifth Circuit recognized "provided motive and context for what would otherwise be a wholly inexplicable crime." *Carty*, 583 F.3d at 261; (USCA5 1828-29). Corona did not want to testify against Carty but felt he had no choice because counsel failed to contact him or inform him of Texas's spousal privilege. (USCA5 187.)

Second, counsel failed to speak with Charlie Mathis, the DEA agent to whom Carty reported when she was a confidential informant. While counsel failed to elicit favorable testimony from Mathis during the culpability phase (which alone was deficient), the Fifth Circuit noted that there was no "sufficient justification" for failing to place Mathis on the stand during the punishment phase. *Carty*, 583 F.3d at 265. If called, Mathis would have testified that Carty "is not a violent person," and that he did not believe she would be "a future danger." (USCA5 183.) It is difficult to imagine more powerful testimony than for one of the State's star witnesses—who is also a government official—to testify that Carty would not be a future danger to society.

Third, although counsel was aware that Carty was from St. Kitts and obtained funds from the court to conduct an "overseas investigation," counsel did not travel to St. Kitts and therefore failed to collect abundant and powerful mitigating evidence. (Tr. 3:11-13, 21; USCA5 510; *see also infra* Section II.C.) Instead, counsel merely placed Carty's mother, daughter, and sister on the stand—none of whom was prepared to testify—and elicited rote testimony based on boilerplate questions.

The jury was left with no choice but to conclude that Carty had no friends or colleagues that would speak on her behalf. That is simply not the case. What counsel failed to investigate and present to the jury—but has emerged during postconviction proceedings—is a life-worthy image of Linda Carty as appreciated through, *inter alia*, the eyes of the former Prime Minister and deputy Prime Minister of St. Kitts, and more than a dozen former teachers, pupils, and friends.

The Fifth Circuit found that counsel was deficient as to each of the issues on which Carty was granted COA and labeled this a "close case" as to whether Carty was prejudiced by these failures. But the Fifth Circuit concluded that Carty was not prejudiced only through erroneous applications of this Court's precedents. And now Carty faces death in a case where—despite her repeated requests—she *never* has received even an evidentiary hearing on, much less full review of, her constitutional claims in either state or federal court.

I. Procedural History

Carty was convicted of capital murder and sentenced to death in Texas state court in 2002. The

Court of Criminal Appeals (CCA) affirmed. *Carty v. State*, No. 74,295, 2004 WL 3093229 (Tex. Crim. App. Apr. 7, 2004) (unpublished). Carty pursued state post-conviction relief;[1] the CCA adopted the state habeas court's recommendations and denied relief. *Ex parte Carty*, No. WR-61,055-01 (Tex. Crim. App. Mar. 2, 2005) (unpublished).

Following the CCA's denial, Carty timely filed her federal habeas petition. The district court granted the State's motion for summary judgment, denied Carty's motion for evidentiary hearing and petition, and dismissed her case with prejudice. (App. D.) The district court partially granted COA (App. E), and the Fifth Circuit denied Carty's motion for additional COA issues (App. B). After oral argument, the Fifth Circuit affirmed. (App. A.) Panel rehearing was denied (App. C), and this Petition follows.

II. Facts Material to the Questions Presented

Early on May 16, 2001, four men with guns broke into the apartment where Joana Rodriguez lived with her husband, her infant son, and her husband's cousin. (Tr. 20:54-55.) Demanding money and drugs, the men tied up Rodriguez's husband and cousin, and kidnapped Rodriguez and the baby. (Tr. 20:33-34, 39-40, 56, 62-63.) Rodriguez's body was later found in a car trunk; she had suffocated. (Tr. 21:142-43.) The baby was found unharmed. (Tr. 21:125-26, 136-37.) Carty was arrested in connection with the crime. (Tr. 4:70.) Despite Carty's protests, on September 18, 2001, the court appointed Jerry Guerinot[2] as Carty's counsel (Tr. 2:4-6; USCA5 199-200) and Windi Akins as co-counsel (Tr. 3:4).

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[1] During state habeas proceedings, the British Government contacted Baker Botts and requested that it participate in Carty's case. (SHR 477-79.)

A. Counsel's deficient investigation and trial preparation

To begin, trial counsel *never* even met with Carty until approximately two weeks before voir dire, and then only for about 15 minutes. (USCA5 200.) Similarly, counsel's investigator, John Castillo, began his rudimentary investigation only two weeks before trial. This "investigation" consisted of speaking briefly with Carty, inspecting Carty's residence and the location where Rodriguez's body was found, and issuing trial subpoenas. (USCA5 200, 222-34.) Although this limited investigation disclosed that Carty was a foreign national, counsel did not inform Carty of her rights as a St. Kitts and British citizen to consular contact and assistance under the Vienna Convention and the Bilateral Treaty.[3] (USCA5 192, 197, 199.)

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[2] At the time, Guerinot was handling at least seven other felony cases, including another capital case, and was serving as a city prosecutor. (USCA5 125, 644-63.) Twenty of Guerinot's clients have been sentenced to death. David Rose, *Lethal Counsel*, THE OBSERVER, December 2, 2007, at 25 (USCA5 2716).

[3] Carty would have exercised such rights (USCA5 199), and the British and the St. Kitts Governments would have assisted in obtaining counsel of Carty's choice, identifying and locating fact and character witnesses, and facilitating visas for any foreign witnesses (USCA5 192-93, 195-97). *See* Vienna Convention on Consular Relations art. 36.1(b), Apr. 24, 1963, 596 U.N.T.S. 261; United Kingdom Consular Officers Convention art. 16(1), T.I.A.S. No. 2494, 3 U.S.T. (ratified Aug. 8, 1952).

During interviews with Castillo and court-appointed psychologist Dr. Jerome Brown, Carty provided detailed information about Corona (USCA5 206, 209, 228-30, 250, 252, 263-64, 445, 447, 516) and Mathis (USCA5 228-29, 516). Carty likewise provided specific details about her family and St. Kitts background to Castillo and Dr. Brown. (USCA5 249, 253, 446, 515.) Carty also informed each about being raped and then giving up for adoption a daughter. (USCA5 209, 447, 516.)

Counsel never investigated these significant leads. The information Carty provided demonstrated that she and Corona shared a common-law marriage. (USCA5 209, 250, 252, 263-64, 445, 447, 516.) Notwithstanding, counsel ***never even interviewed Corona***, who would become an indispensible witness for the State to establish its theory of the case. (USCA5 187, 510.) Counsel similarly never interviewed Mathis about his knowledge of the offense or asked if he would provide mitigating testimony. (USCA5 183.) Counsel barely spoke to Carty's family who testified during punishment (USCA5 466, 478, 489, 510), leaving them completely unprepared to testify (USCA5 466, 489). Counsel did not contact any of Carty's other family in Houston or elsewhere. (USCA5 510, 554, 557, 562, 565, 568.) Nor did counsel perform any St. Kitts-related investigation. (USCA5 510.)

Counsel also failed to contact or interview any of the alleged accomplices, including Josie Anderson, Marvin "Junebug" Caston, Chris Robinson, and Zebediah Combs, and failed to contact the State's medical examiner, Dr. Paul Schrode. (*See* USCA5 481.)

B. Culpability phase

Lacking any forensic evidence linking Carty to the crime, the State solely relied upon the testimony of Corona, Mathis, and Carty's alleged accomplices to establish Carty's guilt. Corona testified that Carty had told him she was pregnant on several occasions but never had a baby. Corona thought Carty was lying about being pregnant, so he wanted to leave her. (Tr. 20:190, 200-03.) Corona finally left Carty in early May 2001. (Tr. 20:205-06.) Corona testified that Carty called him on Tuesday, May 15, to tell him she would have his baby boy the next day, and on Wednesday, May 16, to tell him it would be that day. (Tr. 20:208-09.)

It is universally agreed that Corona's testimony provided context and motive for an otherwise wholly inexplicable crime—supporting the State's theory of the case that Carty was obsessed with her husband and would do anything to keep him. *Carty*, 583 F.3d at 261; (Tr. 24:143-44, 145, 149, 153-54; USCA5 1828-29, 1835). The Fifth Circuit correctly noted that counsel's failure to interview Corona or inform him of the spousal privilege was objectively unreasonable and constituted deficient performance, but incorrectly applied a more stringent standard than *Strickland* requires to find no conviction prejudice. *Carty*, 583 F.3d at 259, 261.

Mathis testified that Carty was no longer on the DEA's "books" as a confidential informant (Tr. 21:96-98), which the prosecution relied on as evidence of Carty's propensity towards lying (Tr. 24:149-50).

The State also presented testimony from Anderson, Caston, Robinson, and Combs, each of whom admitted being involved in the crime. (*See* Tr. 21:229; 22:63-65, 176-204; 23:108-09.) Counsel did not request a jury instruction that these State's witnesses were accomplices as a matter of law. Counsel compounded this error by failing to object when, during closing arguments, the prosecution misstated Texas law regarding accomplices by stating that Anderson, Caston, and Combs could not be accomplices as a matter of law because they were not present during the actual kidnapping itself. (Tr. 24:110-12.) Counsel also did not review videotaped police statements until after trial began and therefore was unable to edit and thus use any portion of these prior statements for impeachment. (Tr. 22:25, 104; 23:13-14.)

C. Punishment phase

According to the former Prime Minister of St. Kitts, Dr. Kennedy Simmonds, Carty was "one of the most outstanding people in her area" "who was able to bring people together to support a good cause" with regard to her involvement with the political party People's Action Movement (PAM). (USCA5 498.) The former deputy Prime Minister, Michael Powell, recounted Carty's courageous volunteering as a young PAMite. (USCA5 580.) Close friends and fellow teachers highlighted Carty's caring dedication, especially to the "weaker" students (*see* USCA5 619, 629), while the former St. Kitts Education Minister, Sidney Morris, described how Carty raised money to "keep the school running" (USCA5 729). Fellow church members described Carty's leadership in "neighborhood clean ups and visiting the sick." (USCA5 716.) Although the Fifth Circuit found that this undisputed, positive testimony (*e.g.*, USCA5 757-69) "would have provided a much more nuanced and detailed vision of Carty's life and contributions to the St. Kitts community," it incorrectly found that Carty was not prejudiced by counsel's failure to conduct the very overseas investigation counsel had obtained funds to complete. *Carty*, 583 F.3d at 265-66.

Mathis would have testified regarding Carty's nonviolent nature and her valuable service as a DEA informant, including his willingness to put Carty back "on the books" as an informant. (USCA5 182-83.) Mathis's testimony would have been especially compelling given that he is a government officer and key State's witness.

Carty's immediate family would have provided substantial testimony about her personality as an involved mother and effective teacher (USCA5 461-64, 476-78, 487-89) instead of just responding to boilerplate questioning to state that Carty followed rules and did not start fires, vandalize or steal, or harm animals (Tr. 26:56-60, 67-69, 81-82). Other members of Carty's family would have testified about her generous nature, involvement with church and the community, and prior abusive relationships. (USCA5 553-69.)

Trial counsel never provided Dr. Brown with details about Carty's medical, work, and family history, or with the State's theory of the case. (Tr. 26:10-11; USCA5 470-74.) Consequently, Dr. Brown's testimony was undermined on cross tending to portray Carty as a liar and someone who might pose a future danger (Tr. 26:29, 32, 41-42; USCA5 471-74), contradicting his assessment that the deliberate planning and nature of the crime was inconsistent with Carty's character. (USCA5 469-70, 515-19.) Based on Carty's background records and information, Dr. Brown would have asserted that Carty posed no continuing threat. (USCA5 471-74.)

Trial counsel's failure to perform any mitigation investigation—whether in the United States or in St. Kitts—left the jury with the mistaken impression that Carty was a liar and a criminal with no one other than immediate family members willing to testify on her behalf. This is far from the case.

REASONS FOR GRANTING THE PETITION

This Petition provides this Court with a vehicle to clarify a number of issues related to the right to effective assistance of counsel that have caused great confusion in the lower courts.

I. This Court should grant certiorari to resolve a conflict regarding whether piecemeal application of 28 U.S.C. § 2254(d) deference and de novo review is appropriate where the state court did not adjudicate the entirety of petitioner's ineffectiveness claim.

The Fifth Circuit's divide-and-conquer method of reviewing Carty's *Strickland* claim deprived her of the opportunity to experience de novo review of her fully developed IAC claim. This is not a case where Carty raised new evidence for the first time in federal proceedings in an attempt to circumvent AEDPA. Here, Carty presented to the state court the additional *Strickland* evidence considered by the Fifth Circuit—however, the state court simply ignored it and never adjudicated the merits of Carty's full *Strickland* claim.

Section 2254(d) itself limits application of the deference standard to "any claim that was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). As the Tenth Circuit has discerned, "an ineffectiveness claim has not been adjudicated on the merits when the state court failed to consider the evidence on which the defendant based his claim." ***Wilson v. Workman***, 577 F.3d 1284, 1293 (10th Cir. 2009) (en banc). Therefore, as long as the defendant properly presents his evidence to the state court (*i.e.*, there is no procedural bar) and "otherwise satisfies AEDPA's requirements, the federal court will review the claim de novo." *Id.*; *see also* ***Cargle v. Mullin***, 317 F.3d 1196, 1212 (10th Cir. 2003) ("Given the [state court's] procedural rejection of nearly all of petitioner's allegations of ineffectiveness, an adequate assessment of prejudice arising from the ineffectiveness of petitioner's counsel has never been made in the state courts, so we have no state decision to defer to under § 2254(d) on this issue.").

Workman involved two federal habeas actions where the Oklahoma Court of Criminal Appeals refused to consider non-record evidence in support of the defendants' IAC claims, relying on a technical procedural rule. 577 F.3d at 1286-87. The Tenth Circuit reasoned that:

> Under AEDPA, federal courts must defer to the state court's resolution of a claim when the state court has adjudicated the petitioner's claim "on the merits." If there has been no adjudication on the merits, we review the claim de novo. In the cases before us, the state court disposed of mixed questions of law and fact, but did so on a factual record that was, solely as a result of the state procedural rule, incomplete. We hold that when the state court makes such findings on an incomplete record, it has not made an

> adjudication on the merits to which we owe any deference.
>
> The merits question presented is whether, in light of non-record evidence, trial counsel's performance satisfied constitutional standards. If, because of procedural obstacles to supplementing the record, the state court does not consider the material, non-record evidence that has been diligently placed before it, it perforce does not provide an answer to that question. Ineffective assistance claims based on a failure to investigate will almost always involve evidence not contained within the record . . . . If the state court fails to consider the very evidence that the claim is based upon, then the state court has not adjudicated the merits of the claim.

Id. at 1290-91.

There is nothing radical about this conclusion. *Strickland* itself established that a reviewing court must "independently reweigh[] the evidence" and "consider the totality of the evidence" when "assessing the prejudice from counsel's errors." 466 U.S. at 695. This means *all* the evidence. *Accord Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (noting that in capital sentencing context "we reweigh the evidence in aggravation against the totality of available mitigating evidence"). But Carty never received that chance.

Here, the CCA completely ignored all the *Strickland* evidence Carty attached to her Additional Further Response. Although the district court determined that such evidence was unexhausted and thus subject to a federal procedural bar (App. C. 126a), the Fifth Circuit held that the State expressly waived exhaustion pursuant to Section 2254(b)(3), *Carty*, 583 F.3d at 257. Indeed, the Fifth Circuit found that the CCA "adjudicated part, but not all, of her claim of ineffective assistance," *id.* at 253, and agreed that Carty had met AEDPA's exhaustion requirement, *id.* at 257. Yet, contrary to the Tenth Circuit's decision in *Workman*, the Fifth Circuit applied AEDPA's deferential standard to all the critical evidence that Carty presented with regard to counsel's investigation and presentation of Carty's family members during the punishment phase.[4] *Id.* at 253 ("We review under AEDPA's heightened standard the portion of Carty's claim of trial counsel's ineffective assistance in presenting mitigation evidence that the CCA adjudicated on the merits."), 264. To further confuse its review, the Fifth Circuit applied de novo review to "the rest"/"the remainder" of Carty's IAC claim. *Id.* at 253, 265.

The Fifth Circuit's deviated manner of review is legally incorrect and fundamentally unfair because Carty's entire claim has never been adjudicated on the merits in state *or* federal court. As the *Workman* court explained:

> AEDPA entitles a defendant to receive de novo review of his claim from *some* court .... If the state court does not perform this review because it has limited its

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[4] This included all the expanded family affidavits presented with Carty's Additional Further Response, which the state court failed to consider.

> review to the trial record, and the federal court does not perform this review because it nonetheless defers to the state court's judgment, then de novo review will never be performed.

577 F.3d at 1293 (emphasis in original). Carty does not seek two bites at the apple—only one proper bite, as she is entitled to under federal law.[5]

The *Workman* court explicitly recognized that it was already in direct conflict with Fifth Circuit law regarding whether to apply AEDPA deference to a state court's IAC determination when the state court fails to consider non-record evidence and made it clear that it had no intention of voluntarily reconciling this split: "[t]o the extent that our reasoning differs from that of the Fifth Circuit, we adhere to our view." *Id.* at 1295 (citing *Valdez v. Cockrell*, 274 F.3d 941, 953-54 (5th Cir. 2001)). The *Carty* decision only drives the wedge between the Fifth and Tenth Circuits deeper. While the Fifth Circuit now has recognized that there are circumstances where *Strickland* evidence should be given de novo review for the first time in federal court, it partitions its review by deferring to the incomplete portions of the evidence that the state court considered.

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[5] Carty also maintains that the Fifth Circuit should not have deferred to the state court's findings and conclusions related to counsel's investigation and presentation of mitigating evidence from her family because they were unreasonable determinations under Section 2254(d). For instance, the Fifth Circuit unreasonably determined that Carty's allegedly uncooperative behavior undermined the family aspect of her IAC claim despite her providing information on several family members, and that much of the family evidence could be discounted as cumulative despite this Court's pronouncements in *Williams* and *Wiggins*. *See Carty*, 583 F.3d at 264-65. However, the salient point for purposes of this particular issue is that all aspects of Carty's IAC claim must be reviewed de novo, which never occurred here.

This acknowledged division between the Fifth and Tenth Circuits represents part of a broader split that has been percolating among the circuits concerning AEDPA's interpretation: whether Section 2254(d) requires deference when new *Strickland* evidence or evidence supporting a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), is presented for the first time during federal habeas. A fundamental disagreement exists among the circuits that has been brewing for nearly a decade. *See LeCroy v. Sec., Dep't of Fla. Corrections*, 421 F.3d 1237, 1262-63 (11th Cir. 2005) (examining split).

At least six circuits already have taken sides in this contentious debate. The Ninth and Tenth Circuits both have held that where new evidence is adduced at a federal hearing, AEDPA deference does not apply. *See Killian v. Poole*, 282 F.3d 1204, 1207-08 (9th Cir. 2002) (refusing to apply AEDPA deference when "[e]vidence of . . . perjury" is "adduced only at" federal hearing); *Harris v. Terhune*, 92 Fed. App'x 462, 463 (9th Cir. 2004) (same in *Strickland* context); *Miller v. Champion*, 161 F.3d 1249, 1253-54 (10th Cir. 1998) (holding that AEDPA deference does not apply when federal court holds evidentiary hearing).

On the other hand, the Second, Fifth, Sixth, and Seventh Circuits all have taken the position that the deferential standard of review mandated by Section 2254(d) "[does] not lose [its] force because an intervening evidentiary hearing is held in federal court," even if material new evidence emerges.[6] *Wilson v. Mazzuca*, 570 F.3d 490, 500 (2d Cir. 2009); *accord Johnson v. Luoma*, 425 F.3d 318, 324, 328 (6th Cir. 2005); *Pecoraro v. Walls*, 286 F.3d 439, 443 (7th Cir. 2002); *Valdez*, 274 F.3d at 952. According to this view, additional "evidence obtained in such a [federal court] hearing is quite likely to bear on the reasonableness of the state courts' adjudication," but there is no reason "why it should alter the *standard* of federal review." *Pecoraro*, 286 F.3d at 443 (emphasis in original). Further, "[a]ny new evidence uncovered in the federal proceeding is relevant only insofar as it assists the habeas court in determining whether the state court reached an unreasonable application of law" under the AEDPA standard. *Mazzuca*, 570 F.3d at 500.

In *Bell v. Kelly*, 128 S. Ct. 2108 (2008), the Court granted certiorari to resolve this split. In *Bell*, the petitioner argued that the Fourth Circuit had agreed to split the baby by "agreeing with the Ninth and Tenth Circuits with respect to *Brady* materiality, yet siding with the Fifth, Sixth, and Seventh Circuits with respect to *Strickland* prejudice." Petition for Writ of Certiorari at 20, *Bell v. Kelly*, 129 S. Ct. 393 (2008) (No. 07-1223). However, *Bell* was dismissed as improvidently granted after oral argument. *Bell v. Kelly*, 129 S. Ct. 393 (2008). Indeed, the facts of *Bell* made it a poor vehicle to resolve this important split—the federal court ultimately heard very little in the way of new evidence not previously available in the state court.

But the defects in *Bell* are not present here. Indeed, Carty presents almost the exact case that this

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[6] Despite repeated requests, Carty was denied an evidentiary hearing in both state and federal court.

Court in *Bell* was "worried about around the corner." *Bell v. Kelly* Oral Arg't (Souter, J.) 47:1-2. The Court's greatest concern was with:

> the claim in which it is not defaulted, in the sense that he is at fault in any way for failing . . . to get his entire presentation now into the State court then. So that it is not a defaulted claim in the classic sense. It is not a claim in which he is at fault by having failed to present it in the State court.
>
> And in that case, if it cannot go back, if the State court will not take it back, don't we have to find at least implicit in [AEDPA] the possibility of litigating the—the fully developed claim in the Federal court without a need to defer to the State court findings?

Id. at 45:17-46:6. This case should trouble this Court even more than *Bell* because Carty did not adduce any new evidence in a federal evidentiary hearing. But even though the Fifth Circuit agreed that the bulk of Carty's IAC claim was not defaulted, it refused to apply de novo review to her whole claim.

The Fifth Circuit's decision thus creates a new but conceptually related split with the Tenth Circuit: When the state court fails to consider evidence, and the evidence is not defaulted for federal habeas review, what standard of review applies to the petitioner's unitary IAC claim? Under the Fifth Circuit's analysis, the unacceptable answer is that a petitioner in Carty's position can never receive a complete adjudication of her fully developed *Strickland* claim. Congress surely did not intend this result. Even the express language of section 2254(d) demonstrates that deference is only owed where a claim is "adjudicated on the merits." As the Tenth Circuit rightly determined, there must be implicit in the statute the opportunity for a defendant in Carty's position to receive de novo review of her *entire* claim—not just pieces of it.

II. This Court should grant certiorari to resolve conflicts among the lower courts as to whether *Strickland* requires that the prejudice from deficiencies at the culpability phase be considered in aggregation, together with all categories of mitigating evidence.

In *Strickland*, this Court instructed courts how to assess prejudice for claims of IAC: "When a defendant challenges a death sentence . . . , the question is whether there is a reasonable probability that, absent the *errors*, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695 (emphasis added). "In making this determination, a court . . . must consider the *totality* of the evidence before the judge or jury." *Id.* at 695–96 (emphasis added).

In *Williams* and *Wiggins*, this Court reaffirmed that courts must conduct *one* sentencing prejudice assessment in which *all* the relevant errors involving IAC are cumulated and then reweighed. *See Wiggins*, 539 U.S. at 534 ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."); *Williams*, 529 U.S. at 397-98 (finding state court's sentencing prejudice determination unreasonable where it "failed to evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation"). Not only must courts cumulate the effects of both culpability and punishment phase errors, but also courts must view "the entire postconviction record" "as a whole and cumulative of mitigation evidence presented originally" when assessing sentencing prejudice. *Williams*, 529 U.S. at 399.

The Fifth Circuit's ruling in this case strayed far from what appears to be this Court's clear mandate. First, it failed to remove the improper culpability phase aggravating evidence from the sentencing prejudice assessment. *See Carty*, 583 F.3d at 262–66. Second, it conducted separate and independent sentencing prejudice assessments for the instances of deficient performance it found related to mitigating evidence—counsel's failure to investigate and present the mitigating evidence from Mathis, Carty's former DEA boss, and from 17 of Carty's friends and colleagues in St. Kitts, including former fellow teacher and pupils, as well as the former Prime Minister, deputy Prime Minister, and Education Minister of St. Kitts—and failed to aggregate the postconviction evidence with such mitigating evidence as was originally presented by Carty's family. *See id.* at 265–66.[7] By contrast, the Fifth Circuit should have removed the improper aggravating evidence from the scale, then added *all* the mitigating evidence together, and finally analyzed whether the balance of aggravating and mitigating circumstances warranted death.

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[7] The court also failed to consider additional evidence tending to refute future dangerousness and tending to inject lingering doubt, other mitigating evidence related to Dr. Brown and Carty's rape, and other errors affecting sentencing prejudice because, as argued in Section V, it incorrectly did not grant COA on the majority of Carty's IAC claim. (*See* App. B.)

A. The Fifth Circuit's failure to remove improper aggravating evidence in *Carty* defies what appears to be the clear mandate of *Strickland* and its progeny that the spillover effects of culpability phase errors must be considered when analyzing sentencing prejudice.

Other courts of appeals have concluded that the spillover effects of culpability phase ineffectiveness must be considered when assessing sentencing prejudice. The Tenth Circuit, in *Cargle v. Mullin*, affirmed granting Cargle's habeas petition because he received IAC during the sentencing phase. 317 F.3d 1196, 1199–1200 (10th Cir. 2003). The court noted that its "consideration of petitioner's claim of error at the penalty phase may be cumulated with guilt-phase error, so long as the prejudicial effect of the latter influenced the jury's determination of sentence." *Id.* at 1208. It is a "commonsense notion" that a "guilt-phase error" can have a "continuing, cognizable effect on the penalty phase." *Id.* As such, the court considered one culpability phase error by counsel that had been ignored below because the "decision to grant relief on ineffective assistance grounds is a function of the prejudice flowing from all of counsel's deficient performance—as *Strickland* directs it to be." *Id.* at 1212.

Similarly, the Eleventh Circuit, in *Smith v. Wainwright*, 741 F.2d 1248 (11th Cir. 1984), concluded that Smith was entitled to a hearing on his IAC claim. *Id.* at 1252. The court held that counsel's error during the culpability phase, in not impeaching two witnesses during cross-examination with their pretrial statements, *see id.* at 1254, "may not only have affected the outcome of the guilt/innocence phase, it may have changed the outcome of the penalty trial," *id.* at 1255, particularly where "jurors may well vote against the imposition of the death penalty due to the existence of 'whimsical doubt,'" *id.* Finally, the Ninth Circuit has held that "[t]he combination of counsel's guilt and penalty phase deficiencies . . . combined to deny Daniels effective representation and prejudiced the outcome of his penalty phase trial." *Daniels v. Woodford*, 428 F.3d 1181, 1210 (9th Cir. 2005).

Here, the Fifth Circuit and the State both agreed that Corona provided "motive and context" for the crime. *Carty*, 583 F.3d at 261. Corona provided "the best evidence of their break up a mere two weeks before Rodriguez's murder, of [Carty's] statements at that time that she was pregnant, and of his belief that she was lying about being pregnant." *Id.* at 261. Indeed, the Fifth Circuit acknowledged the "obvious and no small inference that Carty kidnaped Rodriguez's baby and killed Rodriguez to prove to Corona that she had birthed his son and thereby reestablish their relationship." *Id.*

Corona, however, *never* should have testified. Because Corona and Carty agreed that they shared a common-law marriage, *id.* at 259, Corona enjoyed a marital privilege under Texas law that would have excused him from testifying, *see id.* at 258, 261. But Carty's trial counsel failed to contact and interview Corona, much less inform him of his privilege. *Id.* at 259. The Fifth Circuit found that "trial counsel performed objectively unreasonably by failing to interview Corona to determine if he could or would assert a marital privilege." *Id.* Moreover, the court expressed this was a "close case" for conviction prejudice. *Id.* at 259, 261. It did not, however, remove Corona's aggravating testimony from the scale when assessing sentencing prejudice. *See id.* at 262–66.[8]

Even if the jury still would have convicted Carty without Corona's testimony (which Carty argues against in Section IV),

> [t]he fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no reasonable doubt—doubt based upon reason—and yet some genuine doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt—this absence of absolute certainty—can be real.

Wainwright, 741 F.2d at 1255 (quoting *Smith v. Balkcom*, 660 F.2d 573, 580-81 (5th Cir. Unit B 1981), *modified*, 677 F.2d 20, *cert. denied*, 459 U.S. 882 (1982)). "[J]urors may well vote against the imposition of the death penalty due to the existence of 'whimsical doubt.'" *Id.*

Therefore, a powerful chance exists that absent any context and explanation for why Carty committed this crime, which Corona clearly provided according to the Fifth Circuit and the State, *Carty*, 583 F.3d at 261, at least one juror would have entertained a genuine, lingering doubt about Carty's guilt—enough to give him pause when choosing whether to impose death.[9] Moreover, Corona's testimony certainly had a "continuing, cognizable effect on the penalty phase," *Cargle*, 317 F.3d at 1208, because it magnified the strength of the evidence of future dangerousness the prosecution presented during the punishment phase. Without Corona's presentation of Carty as a compulsive, obsessed liar, the State's aggravation case is reduced primarily to Carty's prior arrest for auto theft and a dismissed drug charge. *Carty*, 583 F.3d at 250.

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[8] Corona's testimony entered the evidence pool for sentencing purposes because Texas law *requires* the jury "to consider all evidence admitted at the guilt or innocence stage" for the aggravation Special Issues and "all of the evidence" for the mitigation Issue. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(b), (d)(1) (e)(1) (Vernon 2006).

B. The Fifth Circuit's decision to engage in separate prejudice inquiries for each of counsel's failures to investigate and present mitigating evidence violates *Strickland*, *Wiggins*, and *Williams*.

The Fifth Circuit further conducted separate prejudice assessments for the various instances of deficient performance involving counsel's failure to investigate and present mitigating evidence. *Carty*, 583 F.3d at 264-66. Instead, the Court should have conducted a single prejudice assessment for the instances of deficient performance it found with regard to Corona[10] and Mathis and Carty's St. Kitts friends and colleagues and also should have cumulated all the mitigating evidence assessed during habeas with what was presented at trial. *See Wiggins*, 539 U.S. at 534; *Williams*, 529 U.S. at 398-99.

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[9] The Fifth Circuit recognized that the State exploited the power of a husband's words during closing: "that every time [he] tried to end [their relationship], Carty announced she was pregnant" and that "[w]hat Carty wanted, . . . needed, was [the baby] because her life was falling apart and she needed the baby to bring it back together again." *Carty*, 583 F.3d at 261.

By granting certiorari, this Court can ensure that lower courts do not persist in refusing to cumulate all categories of mitigating evidence, as required by *Williams* and *Wiggins*. In contrast with several other circuits,[11] the Fourth and Eleventh Circuits affirmatively have joined the Fifth Circuit in refusing to cumulate all instances of deficient punishment phase performance when assessing sentencing prejudice. *See Carty*, 583 F.3d at 265-66; *Porter v. Attorney General*, 552 F.3d 1260, 1274 (11th Cir. 2008) (analyzing each of petitioner's punishment phase ineffectiveness errors separately for sentencing prejudice), *rev'd in part sub nom. Porter v. McCollum*, 130 S. Ct. 447 (2009) (per curiam); *Hedrick v. True*, 443 F.3d 342, 352–54 (4th Cir. 2006) (same), *cert. denied*, 548 U.S. 928 (2006); *Crawford v. Head*, 311 F.3d 1288, 1321 (11th Cir. 2002); *Holladay v. Haley*, 209 F.3d 1243, 1250-51 (11th Cir. 2000).

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[10] Reasonably competent counsel would have informed Corona about his marital privilege to keep him from testifying during the culpability phase. *Carty*, 583 F.3d at 259. In such circumstances, counsel would not have chosen to call Corona at sentencing. But even ignoring counsel's culpability phase error, once Corona had testified, counsel committed further error by not calling him to offer mitigating testimony. *See id.* at 265.

[11] *See Stevens v. McBride*, 489 F.3d 883, 897–98 (7th Cir. 2007) (finding sentencing prejudice based on multiple punishment phase errors); *Marshall v. Hendricks*, 307 F.3d 36, 115 (3d Cir. 2002) ("A proper prejudice determination requires the reviewing court to reweigh the aggravating and mitigating factors with all of the corrections taken into account."); *Silva v. Woodford*, 279 F.3d 825, 847 (9th Cir. 2002) (finding sentencing prejudice after cumulating mitigation deficiencies); *Skaggs v. Parker*, 235 F.3d 261, 274 (6th Cir. 2000) (same as *Stevens*).

Here, Carty presented favorable testimony about her DEA informant activities, and supportive statements from 17 St. Kitts colleagues and friends, including former government officials, about her "life and contributions to the St. Kitts community" through her political, social, religious, and charitable activities, and through her teaching. *Carty*, 583 F.3d at 265-66 ("Indeed, these witnesses would have provided a much more nuanced and detailed vision of Carty's life[.]").[12] Had it respected *Strickland* and its progeny, the Fifth Circuit would have cumulated all the instances of deficient punishment phase performance related to Mathis and the 17 St. Kitts witnesses, together with the mitigating evidence adduced from her family at trial, when assessing sentencing prejudice and found that at least one juror would have agreed not to sentence Carty to death based on a much richer, positive depiction of Carty drawn from the various aspects of her life. This is particularly the case when such positive evidence is reweighed against the State's case absent Corona's testimony, *and* in light of Carty's lack of criminal history of violence.[13]

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[12] The Fifth Circuit, like the district court, improperly discounted the positive St. Kitts evidence as being removed in time and location from Carty's life at the time of the crime. *See Carty*, 583 F.3d at 265. This Court in *Williams* clearly prohibited such treatment: "Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." 529 U.S. at 398.

III. This Court may reverse and remand this case for further consideration in light of *Porter v. McCollum*.

After the Fifth Circuit's decision in this case, this Court suggested that courts *must* cumulate all instances of deficient penalty phase performance when assessing sentencing prejudice. *See Porter*, 130 S. Ct. at 454. In *Porter v. McCollum*, this Court held that Porter established that his counsel provided deficient sentencing phase performance, *id.* at 453, and that the deficient performance caused him prejudice, reversing the Eleventh Circuit, *see id.* at 455–56, which had "*separately* considered each category of mitigating evidence and held [that] it was not unreasonable for the state court to discount each category," *id.* at 452 (emphasis added). This Court instead cumulated all four categories of mitigating evidence—Porter's "heroic military service," his "struggle to regain normality" after a war, "his childhood history of physical abuse," and "his brain abnormality." *Id.* at 454. Though this Court did not state explicitly that the Eleventh Circuit erred in conducting piecemeal prejudice inquiries, its own assessment demonstrates the correct cumulation. This Court should grant certiorari to hold explicitly what *Porter* intimated and prevent the Fourth, Fifth, and Eleventh Circuits from again engaging in separate prejudice assessments for each instance of sentencing-phase deficient performance. Alternatively, this Court should reverse and remand this case for further consideration in light of *Porter*.

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[13] Also, Carty never would be able to abduct a child in prison society. *See Berry v. State*, 233 S.W.3d 847, 863-64 (Tex. Crim. App. 2007) (considering defendant's lack of criminal record and improbability of becoming pregnant in prison in decision to reform death sentence to life in prison).

IV. This Court should grant certiorari because the Fifth Circuit improperly applied the prejudice standard from *Lockhart v. Fretwell*, further exhibiting a pattern in the circuit of misapplying *Lockhart*.

This Court also should grant certiorari to correct the Fifth Circuit's improper assessment of conviction prejudice. The Fifth Circuit erred in applying *Lockhart v. Fretwell*, 506 U.S. 364 (1993), and thus subjected Carty to a more stringent prejudice inquiry than *Strickland* requires.[14]

In *Lockhart*, this Court held that a *Strickland* prejudice "analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart*, 506 U.S. at 369. *Lockhart* involved counsel's failure to object to an instruction in a sentencing proceeding. *See id.* at 366. At the time of sentencing, the objection likely was meritorious, "[b]ut by the time the Eighth Circuit reviewed respondent's ineffective assistance claim, on-point Circuit authority bound that court to hold the objection meritless." *Id.* at 374 (O'Connor, J., concurring). Justice O'Connor "point[ed] out that [*Lockhart*] will, in the vast majority of cases, have no effect on the prejudice inquiry under *Strickland*," *id.* at 373 (O'Connor, J., concurring), because it "was predicated . . . on the suggestion that [the petitioner] might have been denied a right the law simply does not recognize," *id.* at 375 (internal quotation marks omitted).

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[14] *Strickland* prejudice only requires a showing of "a reasonable probability that at least one juror would have struck a different balance" on guilt or on punishment. *Wiggins*, 539 U.S. at 537-38.

In *Williams*, this Court indeed explained that "*Lockhart v. Fretwell* do[es] not justify a departure from a straightforward application of *Strickland* when the ineffectiveness of counsel *does* deprive the defendant of a substantive or procedural right to which the law entitles him." 529 U.S. at 393 (alteration and emphasis in original) (citation omitted). In cases not involving the unique circumstances of *Lockhart*—where the law subsequently changes and eliminates an arguable error by trial counsel—this Court prohibits applying the *Lockhart* standard. *See Williams*, 529 U.S. at 394.

Lockhart's rule has no applicability here because Carty's IAC claim is not predicated on the suggestion that she was denied a right that the law no longer recognizes. Her claim is based in part on the simple failure to adequately prepare and present the case, and as found particularly by the Fifth Circuit, that "trial counsel performed objectively unreasonably by failing to interview Corona to determine if he could or would assert a marital privilege." *Carty*, 583 F.3d at 259. This rule of privilege still exists, without alteration, under the Texas Rules of Evidence. *See* TEX. R. EVID. 504(b)(1).

But the Fifth Circuit nevertheless applied the *Lockhart* standard. Indeed, in the very first paragraph of its discussion of conviction prejudice, the Fifth Circuit cited, quoted, and applied *Lockhart*: "[A]lthough this is a close case, [Carty] has not made the requisite showing that "[Corona's] testimony rendered her conviction 'fundamentally unfair or unreliable.'"" *Carty*, 583 F.3d at 261 (citing *Ransom v. Johnson*, 126 F.3d 716, 721 (5th Cir. 1997) (quoting *Lockhart*, 506 U.S. at 369)). The Fifth Circuit treated *Lockhart* as controlling law by quoting *Lockhart* as providing the "requisite" standard. *See id.*[15]

In *Williams*, this Court reversed the Supreme Court of Virginia in a similar case. *See* 529 U.S. at 393. Because the Virginia Supreme Court "read our decision in *Lockhart* to require a separate inquiry into the fundamental fairness even when Williams is able to show that his lawyer was ineffective and that his ineffectiveness probably affected the outcome of the proceeding," *Williams*, 529 U.S. at 393, this Court reversed, *id.* at 399. This Court found that the Virginia Supreme Court's analysis, which involved rejecting the prisoner's argument that *Strickland* governs, included the improper application of *Lockhart*. *See Williams*, 529 U.S. at 394. This Court noted that the trial court demonstrated the correct assessment of prejudice in a non-*Lockhart* case: "Unlike the Virginia Supreme Court, the state trial judge omitted any reference to

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[15] Beyond the Fifth Circuit's reliance on *Lockhart* in its opinion, a review of oral argument reveals that the most significant issue confronting the panel was whether "[t]he prejudice standard under *Strickland* is more strict and narrower than what [Carty was] arguing for." (5th Cir. Oral Arg't 12:34.) "[T]he question really comes down to the *Strickland* standard." (*Id.* at 16:32.)

Lockhart and simply relied on our opinion in *Strickland* as stating the correct standard for judging ineffective-assistance claims." *Id.*

Despite this Court's mandate in *Williams* to the contrary, here the Fifth Circuit applied *Lockhart*. The Fifth Circuit did cite *Strickland*, *see Carty*, 583 F.3d at 262, but this nod does not change the fact that in applying *Lockhart*, the court applied the wrong standard. In *Williams*, this Court found error, even though the Virginia Supreme Court cited to *Strickland* after applying *Lockhart*. *See Williams*, 529 U.S. at 394.

This is not an isolated incidence of error. The Fifth Circuit repeatedly has applied *Lockhart* in erroneous circumstances, thus requiring this Court's intervention. *Kunkle v. Dretke*, 352 F.3d 980, 991 (5th Cir. 2003) (rejecting IAC claim based on counsel's failure to present mitigating evidence because petitioner failed to "show that counsel's errors 'rendered the result of the proceeding fundamentally unfair or unreliable'" (quoting *Rector v. Johnson*, 120 F.3d 551, 563 (5th Cir. 1997))); *Johnson v. Cockrell*, 301 F.3d 234, 239 (5th Cir. 2002) (holding that counsel's error in calling father of victim at sentencing phase "certainly fell far short of prejudicing the defendant's case to such an extent that it 'rendered sentencing fundamentally unfair or unreliable'" (quoting *Lockhart*, 506 U.S. at 369)); *see also Bell v. Quarterman*, 330 Fed. App'x 492, 493 (5th Cir. Aug. 3, 2009) (finding that petitioner did not demonstrate "that any error by counsel [in not calling him to testify] was so serious as to 'render[] the result of the trial unreliable or the proceeding fundamentally unfair'" (quoting *Lockhart*, 506 U.S. at 372)). None of these cases warranted application of the *Lockhart* standard. Clearly, the Fifth

Circuit needs to be instructed again on the correct course of applying *Strickland*'s prejudice standard.

Here, the Fifth Circuit, the district court, and even the State all have agreed that Carty suffered deficient performance from her counsel. With regard to prejudice, the Fifth Circuit applied the wrong standard—placing too heavy a burden on Carty—and yet still concluded that "this is a close case." *Carty*, 583 F.3d at 261. If it was a close case under the wrong, higher standard, then Carty should prevail under the correct one. This Court either may state as much in its opinion, as this Court did in *Porter*, or remand to allow the Fifth Circuit to apply the correct standard.

V. This Court should grant review to decide whether the Fifth Circuit's unusual practice of carving a unitary Sixth Amendment claim of ineffective assistance of counsel into multiple distinct "claims," and then deciding whether each such truncated "subclaim" justifies issuance of a COA, violates Section 2253 and *Strickland*.

Another way in which the Fifth Circuit divided up the issue of ineffectiveness in order to ensure that Carty would never receive a full evaluation of her unitary claim involved its denial of COA. (*See* App. B.) The district court similarly had approached the IAC claim in a piecemeal fashion and only had granted a COA on certain portions. *See Carty*, 583 F.3d at 252. Thus, in assessing prejudice, the lower courts could not view the cumulative effects stemming from *all* the ways in which counsel performed deficiently.

This unusual practice of carving up ineffectiveness claims at the COA stage resulted in a complete failure (1) to consider the additional, at the very least debatable, errors related to, amongst other things,[16] counsel's not informing Carty of her Vienna Convention and Bilateral Treaty rights (App. B 56a-58a),[17] and more significantly, (2) to cumulate such errors as part of the totality of evidence that would have factored into the conviction prejudice and sentencing prejudice analyses. As the district court had granted Carty COA on two "subclaims" of ineffectiveness relating to both trial phases, the Fifth Circuit properly should have granted COA as to the entirety of her IAC claim.

The Fifth Circuit departs from the only sensible reading of 28 U.S.C. § 2253(c), which provides that a petitioner who makes "a substantial showing of the denial of *a constitutional right*" is entitled to permission to appeal an adverse district court decision. 28 U.S.C. § 2253(c)(2) (emphasis added). Without debate, Congress guarantees such federal appeal for any petitioner who makes this showing. The Sixth Amendment right to effective assistance of counsel is clearly "*a* constitutional right" within the meaning of Section 2253. While such "constitutional right" may be infringed by any number and type of specific instances of counsel's deficiencies, it remains a unitary right. Therefore, as soon as a petitioner has shown that any error by counsel dipped below prevailing professional standards and is reasonably likely to have affected the verdict, she has satisfied the plain language of Section 2253 and should be provided the opportunity to brief all aspects of her ineffectiveness claim, rather than just those aspects arbitrarily granted COA. Instead of applying Congress' straightforward requirement, the Fifth Circuit permits carving a petitioner's claim that she was "deni[ed] a constitutional right" into multiple constituent "issues," and then requires her to satisfy Section 2253's standard with respect to each of those constituent aspects of her claim, considered individually. This approach frustrates Congress' aim of ensuring meaningful review for petitioners who present a substantial claim of relief.

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[16] Carty also alleged she was prejudiced in her conviction and death sentence by counsel's errors in not adequately presenting and preparing her case, including failing to interview or adequately prepare for the cross-examination of any State witness, such as Mathis, Dr. Schrode, Robinson, and Combs; not soliciting testimony from or adequately preparing defense expert Dr. Brown; not effectively investigating and presenting a future dangerousness defense; failing to properly investigate cause of death and cast doubt on specific intent; conducting an inadequate and inflammatory voir dire; and not objecting to prejudicial argument regarding suppressed evidence and improper accomplice argument and instructions. (*See* App. B.)

[17] The Fifth Circuit denied COA despite its recognition that the Vienna Convention-related aspect of Carty's IAC claim may be "relevant to the development of facts supporting mitigation" (App. B 58a n.6), which illustrates the irrationality of divvying up a single IAC claim for COA purposes.

Moreover, *Strickland* requires a cumulative, not piecemeal, analysis of counsel's deficiencies and their resulting prejudice. *Strickland* refers at least ten times to the "errors" of counsel, in the plural, to describe the appropriate prejudice inquiry. *See, e.g.*, 466 U.S. at 694-96.[18] The collective impact of counsel's errors altogether therefore lies at the very core of the *Strickland* prejudice inquiry.

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[18] *See also Wiggins*, 539 U.S. at 534; *Williams*, 529 U.S. at 394, 398-99.

The Fifth Circuit's implicit refusal to evaluate the cumulative impact of multiple errors by counsel not only runs afoul of *Strickland*, but also directly conflicts with the views of the Second, Seventh, and Ninth Circuits. *See, e.g., Malone v. Walls*, 538 F.3d 744, 762 (7th Cir. 2008) (remanding for district court to conduct new prejudice inquiry: "[*Strickland*] prejudice may be based on the cumulative effect of multiple errors.") (quoting *Hough v. Anderson*, 272 F.3d 878, 891 n.3 (7th Cir. 2001)); *Silva*, 279 F.3d at 834 (granting COA on IAC: "cumulative prejudice from trial counsel's deficiencies may amount to sufficient grounds for a finding on ineffective assistance of counsel."); *Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir. 1991) (noting that because petitioner's "claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions, all his allegations of ineffective assistance should be reviewed together").

Nor is *Carty*'s ruling an aberration in circuit practice. *See also Skinner v. Quarterman*, 528 F.3d 336, 342-45 (5th Cir. 2008) (granting COA on certain IAC aspects while denying COA as to others); *Gonzales v. Quarterman*, 458 F.3d 384 (5th Cir. 2006) (same); *Martinez v. Dretke*, 404 F.3d 878, 878 (5th Cir. 2005) (same).

If a reasonable probability of prejudice exists with respect to any aspect of a petitioner's IAC claim, logic demands that the court should grant COA as to the entire IAC claim. Otherwise, the court unacceptably risks underestimating the collective impact of counsel's deficient performance on the verdict.[19] This Court should intervene to correct the Fifth Circuit's practice and ensure that the entirety of Carty's claim receives appropriate review.

CONCLUSION

This Court should grant Carty's petition for certiorari, or in the alternative, reverse and render relief, or reverse and remand for further consideration.

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[19] The Fifth Circuit brushed aside the possibility of cumulative prejudice from all of counsel's errors here: "the ostensible errors that did occur did not 'so infect[] the entire trial that the resulting conviction violates due process.'" (App. B 59a-60a (quoting *Derden v. McNeel*, 978 F.2d 1453, 1454 (5th Cir. 1992) (en banc)).) The problem with this sweeping statement, aside from the fact that *Derden* did not address cumulative prejudice from multiple IAC errors but instead addressed the due process doctrine of cumulative trial errors, is that the district court already had determined that reasonable jurists could find a possibility of prejudice from two other aspects of Carty's IAC claim. (App. B 48a.)

Respectfully submitted.

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January 25, 2010

APPENDIX

APPENDIX A

FILED September 17, 2009
REVISED October 15, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-70049

LINDA ANITA CARTY,

Petitioner - Appellant,

v.

RICK THALER, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent - Appellee.

Appeal from the United States District Court
for the Southern District of Texas, Houston Division

Before KING, DENNIS, and OWEN, Circuit Judges.

KING, Circuit Judge:

A Texas jury convicted and sentenced to death petitioner-appellant Linda Anita Carty for the intentional murder of Joana Rodriguez during the course of a kidnaping of Rodriguez and her newborn son. The Texas Court of Criminal Appeals affirmed the conviction and sentence and denied post-conviction relief. Carty then filed this federal habeas petition under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C.

§ 2254. The district court denied substantive relief, denied Carty's request for an evidentiary hearing, and dismissed her case. It then granted a certificate of appealability ("COA") for two substantive claims. The first is whether trial counsel rendered ineffective assistance by failing to notify Carty's ostensible common-law husband of his marital privilege not to testify. The second is whether trial counsel rendered ineffective assistance by failing to present additional mitigation evidence in the punishment phase. The district court also granted a COA for the procedural issue that prevented adjudication of those substantive claims-whether Carty exhausted state court remedies.[1] Carty's appeal is now before us. We affirm the district court's judgment denying Carty relief.

I. FACTS AND PROCEDURE

The district court's exhaustive opinion more than adequately documents the factual background and procedural development of this case. *See Carty v. Quarterman (Carty Federal Habeas)*, No. 06-614, slip op. at 4-35 (S.D. Tex. Sept. 30, 2008). Here, we revisit only those facts relevant to our disposition of the presently appealed issues and claims.

Carty, a foreign national citizen of St. Kitts and thus the United Kingdom, was indicted by a Texas grand jury for the kidnaping and intentional murder of Rodriguez. Carty planned the kidnaping of Rodriguez and her baby, facilitated its execution, and murdered Rodriguez on May 16, 2001. Although Carty originally hired her own attorney, when her family could not pay his fees, the

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[1] The court denied a COA for the remainder of Carty's claims. In a separate opinion, we denied Carty's request for an additional COA. *See Carty v. Quarterman*, No. 08-70049, slip op. (5th Cir. Aug. 28, 2009).

Texas trial court appointed Jerry Guerinot and Windi Akins to represent her (collectively, "trial counsel"). Trial counsel met Carty for the first time approximately two weeks before jury voir dire. They hired investigator John Castillo and psychologist Dr. Jerome Brown to aid Carty's defense. Investigator Castillo began his work about two weeks before trial.

The trial proceeded in two phases: guilt/innocence and punishment. The evidence presented in the guilt/innocence phase revealed the following events. Approximately three years before Rodriguez's murder, Carty started living with Jose Corona, and the parties now dispute whether they entered into a commonlaw marriage. Corona testified that they lived together up until two weeks before the murder, and, during that period, they represented to others that they were husband and wife, as discussed in greater detail below. While they lived together, Carty, who had a grown daughter, Jovelle Carty, told Corona three times that she was expecting another child, but she did not allow him to attend her prenatal doctor's visits. In the first two instances, Carty eventually told him that she had miscarried. Corona believed that Carty lied about the pregnancies. At the beginning of May 2001, the month during which Rodriguez was murdered, Corona decided to leave Carty, in part because of her lies about being pregnant. When he told her that he was leaving, Carty again claimed that she was pregnant. Corona, however, did not believe her and moved out. Throughout May, Carty repeatedly called Corona to reconcile their relationship, claiming that she was pregnant and that her due date was in the middle of May. On May 15, she called multiple times and told him she was going to have a baby boy the next day, May 16. She called again on May 16-after she had murdered Rodriguez-and confirmed that she was going to have the baby. When Corona saw Carty later that day at the police station, after she had been arrested for Rodriguez's kidnaping and murder, he asked her if the baby had been born already, and she told him "not yet." Corona eventually found out that Carty had never been pregnant.

Other witnesses' testimonies revealed Carty's activities between Corona's departure and Rodriguez's murder. In early May, Carty began moving her things to things to a storage unit because the apartment lease was due to terminate at the end of the month. Sherry Bancroft, an employee at Public Storage, testified that Carty had an existing storage unit in their facility and rented a second one on May 10. Two days later, she rented a third unit. That day, she told Bancroft that she was already in labor and was expecting to give birth to a baby boy that day. To Bancroft, however, Carty did not look like she was in labor. Carty returned to the storage facility on May 15 in a Pontiac Sunfire. At that point, she told Bancroft that she had birthed a son and that he was at home with his father. She retrieved a baby blanket and two baby outfits from one of her storage units.[2]

Numerous witnesses testified about the kidnaping and murder that occurred the next day, May 16. Early in the morning on May 16, four men—three of whom were later identified as Christopher Robinson, Carliss "Twin" Williams, and Gerald "Baby G" Anderson—broke into the apartment where Rodriguez lived with her husband (Raymond Cabrera), her infant son, and her husband's cousin (Rigoberto Cardenas). Cardenas testified that the men demanded drugs and money. While the men were in the house, Cardenas heard a cell phone ring. One of the men answered it and said: "We are here inside," and "Do you want it?" The man on the phone then yelled: "She's outside, we got to go." The intruders tied up Cabrera and Cardenas and, now joined by Carty, kidnaped Rodriquez and her baby.

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[2] At least two additional witnesses testified that they knew Carty and that she had told them in the days immediately before Rodriguez's murder that she was expecting a baby.

The testimony of Robinson and other individuals with first-hand knowledge of the kidnaping and murder evidenced that Carty planned and orchestrated the crimes because she wanted Rodriguez's baby. On Sunday, May 13, Carty began recruiting a group of people to help her abduct the baby. She asked Robinson, Josie Anderson, and Marvin "Junebug" Caston to assist in a "lick"—a burglary wherein they would break into an apartment and steal what she claimed was approximately 200 pounds of marijuana. Carty brought them to her apartment, which was in the same complex as and in close proximity to Rodriguez's apartment. From Carty's apartment, they scoped out Rodriguez's apartment and familiarized themselves with the standard layout of apartments in the complex. Carty told them that Rodriguez was pregnant with Corona's child; that "I'm going to get the baby. I'm going to . . . take the baby from them. . . I'm going to cut the baby out of the lady and take the baby"; and that "she needed the baby, needed a baby, needed a baby, needed their baby, that she needed the lady's baby." She repeated similar statements throughout the planning of the crime. Because Josie Anderson, Robinson, and Caston were only interested in stealing drugs and not in kidnaping Rodriguez's baby, the plan was for them to secure the drugs while Carty dealt with Rodriguez.

On the night of Sunday, May 13, the group went to the apartment complex to conduct the lick but soon aborted their attempt. Afterwards, Josie Anderson and Caston decided that they would no longer participate. Carty nonetheless persisted in her plan, and on Tuesday, May 15, she convinced Robinson, his friend Williams, and Josie's cousin Gerald Anderson to participate in the lick. The new plan was for Carty to wait outside the apartment, and the men would bring Rodriguez to her after they secured the drugs for themselves. After midnight on May 16, 2001, Carty, Robinson, Williams, and Gerald Anderson left 6402 Van Zandt Street, a house that served as the group's staging area. Carty drove her car and served as a lookout. After parking in a lot near the apartments, she called Gerald Anderson and told him to start the lick. The men kicked in the door of the apartment and tied up and beat Cabrera and Cardenas. Carty called Anderson again and told him that she was coming inside. When she entered the apartment, Robinson lied and told her that they had killed the men (to prevent her from doing it). Robinson then left the apartment. A few minutes later, Robinson saw Carty leave the apartment with the baby. Williams and Gerald Anderson followed with Rodriguez and put her in the trunk of Robinson's car. They left the apartment complex, met at a storage unit, and transferred Rodriguez to the trunk of Carty's car. Both cars then returned to Van Zandt Street.

At Van Zandt Street, Carty demanded that the men tape up Rodriguez. Robinson and Gerald Anderson refused, but Williams complied. He then closed Rodriguez in the trunk of Carty's car. At this point, the men were angry because they had obtained little drugs or money in the lick; they believed that Carty had set them up for a kidnaping that they did not want to commit. Hearing the argument, Zebediah Combs, who lived at 6402 Van Zandt Street and did not participate in the lick, came outside and demanded that everybody be quiet. Carty said to him, "I got my baby. I got my baby." After seeing Rodriguez in the trunk of her car, Combs told Carty to move the car away from the house. Carty refused, and Combs went back inside. Meanwhile, Robinson, Williams, and Gerald Anderson went to make change for the money they had stolen.

When they returned around 3:30 a.m. to 4:00 a.m., Carty was standing partially in the trunk of her car and partially on the ground. Rodriguez was face down in the trunk, and Carty had placed a plastic bag over her head. Robinson ran up and pushed Carty away, but he could see that Rodriguez had stopped breathing. Robinson ripped the bag while attempting to remove it from Rodriguez's head. When Robinson confronted Carty about why she had killed Rodriguez, Carty replied that it was her baby, her husband's baby.

During the police investigation of the burglary and kidnaping, a tenant in Carty's apartment complex, Florence Meyers, told police about an encounter with Carty the day before that was suspicious. On the evening of May 15, Meyers saw Carty sitting in the Pontiac Sunfire in the parking lot of the apartment complex. Carty told Meyers that she was pregnant and that the baby was going to be born the next day. There was an infant's car seat in the back seat of Carty's car. To Meyers, Carty did not appear to be pregnant. Meyers's statement caused the police to suspect Carty had committed the kidnaping.

After taking Meyers's statement, the police called Carty at around 9 a.m. on May 16 and pretended to respond to a complaint she had filed a few days earlier. She agreed to meet them. At the time of the call, Carty was in a car with Robinson and the baby. Robinson drove Carty to meet the police, and she agreed to go with them to a police station. When Carty did not return from the meeting, Robinson went back to Van Zandt Street with the baby.

Upon arriving at the police station, Carty told the police that she was a confidential Drug Enforcement Agency ("DEA") informant, and asked to speak with her DEA agent, Charlie Mathis. A few days before the kidnaping and murder, Carty had called Mathis and told him about being pregnant. The police then asked Mathis to help them find out what Carty knew about Rodriguez and the missing baby. Mathis told Carty she was in a lot of trouble and advised her to help the police.

After speaking with Mathis, Carty gave a statement to the police, telling them that she had loaned her daughter's car and rental car to some people she believed might be involved in the kidnaping. She directed officers to the house at 6402 Van Zandt Street. When the police arrived, a black Chevrolet Cavalier belonging to Carty's daughter Jovelle, and the Pontiac Sunfire, which was rented in Jovelle's name, were both parked at the house. Police found the kidnaped baby boy alive in the Cavalier. They found Rodriguez's body in the trunk of the Sunfire. Her arms and legs were bound with duct tape, her mouth and nose were also taped, and she had a ripped plastic bag over her head which appeared to be taped around the bottom. A forensic expert later determined the cause of death to be homicidal suffocation. Carty's fingerprints were in both cars. Inside the cars, the officers found, *inter alia*, baby clothes, baby blankets, a diaper bag containing infant formula, and other baby paraphernalia. The diaper bag also contained a live round of .38 caliber ammunition. A .38 caliber gun was found by police in a drawer inside the house at 6402 Van Zandt Street; it was similar in appearance to a .38 caliber gun that Corona saw Carty possess before he left in early May.

The police traced Carty's cell phone records, which led them to Gerald Anderson. He eventually gave a statement and was charged with capital murder. Carty's cell phone records showed eleven calls logged between Carty's phone and the cell phone number that led police to Gerald Anderson from 12:50 a.m. and 2:50 a.m. on May 16. Seven of those calls were placed between 1:09 a.m. and 1:14 a.m., the time of the kidnaping.

Based on this and other evidence, the jury returned a verdict of guilty against Carty on the charge of capital murder.

During the subsequent punishment phase, both the state and Carty presented evidence relevant to Texas's "special issues."[8] The state primarily presented evidence about Carty's criminal history to show her ongoing dangerousness. For example, in 1992, Carty was arrested for auto theft when she rented a car that she never paid for or returned. To rent the car, Carty identified herself as an FBI agent, so the FBI also investigated her for impersonating an officer. Carty pleaded guilty and was placed on a ten-year term of probation (she was still on probation when arrested for murdering Rodriguez). The state agreed to dismiss the auto theft charge if Carty would act as an informant. Although she provided information leading to two arrests, her supervising officer concluded that she was an uncontrollable informant. Her service came to an end when she was arrested on drug charges. Police officers had been observing a large drug transaction when Carty entered the house under observation with a package. When she left, the police followed her. She led them on a high-speed chase. During the chase, Carty attempted to run over an officer. The police eventually recovered two pistols, $3,900 in cash, and fifty pounds of marijuana from her car.[4]

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[8] In Texas, jurors must answer three "special issues" in favor of the death penalty for the court to impose capital punishment: (1) whether the defendant would "commit criminal acts of violence that would constitute a continuing threat to society"; (2) whether the defendant actually caused or intended to cause the death of the victim; and (3) whether mitigating evidence warranted "the imposition of life imprisonment rather than a death sentence."

Trial counsel countered with testimony showing that Carty would not be a future danger and that mitigating circumstances existed. To dampen the impact of the prosecutor's evidence of Carty's future dangerousness, trial counsel enlisted the services of Dr. Jerome Brown, a clinical psychologist who evaluated Carty, interviewed her mother and daughter, and reviewed police interrogation tapes. He testified, *inter alia*, that Carty did not have problems with anger or aggression, was not prone to violence, and was not predatory towards other people. She had a stable family life and employment history. She did not have disciplinary problems as a child and described her upbringing as spoiled. Dr. Brown noted that Carty had a grown daughter and had given another child up for adoption when she became pregnant after a sexual assault. Dr. Brown opined that she would not be capable of committing the crime of which she was convicted, that her clinical profile indicated that she was not antisocial, and that she lacked characteristics normally associated with criminals. The prosecution, however, cross-examined Dr. Brown extensively to show that Carty was a liar. Dr. Brown also admitted that Carty met some characteristics of a child abductor, although on redirect he reaffirmed that she did not have traits commonly associated with violent people.

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[4] The prosecution also presented victim impact testimony from Rodriguez's family (her husband Cabrera, her sister, and her father).

Trial counsel also presented testimony from Carty's family to support the mitigation special issue. Carty's mother testified that Carty was a beloved teacher in St. Kitts and that her former students still asked about her. Carty did not have a history of criminality while on St. Kitts, was kind and generous to others, and was never cruel to people or animals. Jovelle, Carty's daughter, testified that her mother was sweet and kind, was not mean, and had not harmed anyone. She had worked hard her whole life to put Jovelle through school. Isalyn DeSouza, Carty's closest sister, testified that she had never known her sister to be violent, destructive, or cruel.

Based on this evidence, the jury answered all three of Texas's special issues in favor of sentencing Carty to death. The trial court entered her conviction and death sentence on February 21, 2002. The Texas Court of Criminal Appeals ("CCA") affirmed Carty's conviction and sentence. *See Carty v. State*, No. 74295, 2004 WL 3093229, at *1 (Tex. Crim. App. Apr. 07, 2004).

The trial court appointed counsel to represent Carty during the state habeas process. Carty timely applied for state habeas relief on August 6, 2003. One of Carty's claims was that trial counsel rendered ineffective assistance by failing to advise her of her right, as a citizen of St. Kitts and the United Kingdom, to consular notification and assistance. *See* Vienna Convention on Consular Relations ("VCCR"), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. The British Government became aware of Carty's citizenship and filed a motion on February 2, 2004, seeking time to retain counsel who could amend Carty's application. Although recognizing that Carty was not authorized to raise new issues at that late date, it nonetheless asked the state habeas court to grant a period of 180 days in which "any amendment or supplement filed in that time should be accepted without the application of [TEX. CODE CRIM. PROC. ANN. art.] 11.071 [§] 5(f)." The state habeas court denied this application for want of jurisdiction.

Carty's habeas counsel filed a reply to the state's answer and later filed a further response, again asking the court to allow the British Government to intervene. The state habeas court did not issue an order on her request. The British Government, however, hired attorneys from Baker Botts, L.L.P., who entered an appearance unopposed on May 28 to serve as Carty's co-counsel. Carty's new co-counsel met with the state habeas judge and the prosecutors to discuss their role. They agreed to submit any additional pleadings to the court by November 1, 2004, the same day that both sides were due to submit their proposed findings of fact and conclusions of law. The parties dispute, however, whether they agreed to permit Carty to raise entirely new claims at that time. Carty asserts that Jane Scott, a Harris

County assistant district attorney, and Roe Wilson, Harris County's chief of the postconviction writs division, agreed that co-counsel would have approximately six months to familiarize themselves with Carty's case and make any additional filings, including proposed findings of fact and conclusions of law, by November 1, 2004. The state denies that any such agreement included permission to raise new claims. Absent a proper extension, November 1, 2004 was well after the deadline for Carty to file new claims. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071 § 4(a) (Vernon 2007).

On November 1, Carty's co-counsel filed an Additional Further Response to the state's answer. On the same day, both parties filed their proposed findings of fact and conclusions of law. The Additional Further Response stated, "[C]ounsel for Carty and the State agreed to additional time for Carty's counsel to examine Carty's claims further. The Court approved this agreement." In the Additional Further Response, Carty raised entirely new claims, supported by exhibits and appendices. The new claims included the two substantive claims that Carty maintains in this appeal—whether trial counsel rendered ineffective assistance (1) by failing to notify Corona of his marital privilege not to testify and (2) by failing to present additional mitigation evidence in the punishment phase.

On November 30, 2004, the state trial court heard argument regarding Carty's habeas application. During that hearing, co-counsel addressed the Additional Further Response on behalf of Carty and argued about claims contained only therein. In particular, co-counsel raised the claims now on appeal. The state did not object and the state habeas court did not mention any delinquency in the filings of those claims. Nonetheless, the court only reviewed the claims Carty raised in her initial application and recommended that the CCA adopt the state's findings of fact and deny those claims, *see Ex Parte Carty*, No. 877592-A, order (Tex. Dist. Ct. Dec. 2, 2004), a recommendation that the CCA adopted, *see Ex Parte Carty*, No. WR-61,055-01, slip op. at 2 (Tex. Crim. App. Mar. 2, 2005). Neither state court addressed the claims she raised for the first time in her Additional Further Response. Carty did not bring this omission to the attention of either court.

Having found no success in the Texas courts, on February 24, 2006, Carty filed an application in federal district court for a writ of habeas corpus under § 2254. She presented approximately twenty issues to the district court. The district court initially denied the state's motion for summary judgment and ordered briefing on certain issues, including whether Carty exhausted state court remedies for the claims she raised for the first time in her Additional Further Response. After briefing, the state renewed its motion. Carty responded and requested an evidentiary hearing. Without a hearing, the district court concluded that Carty failed to raise a triable issue of fact, granted the state's motion for summary judgment, and dismissed the case. *See Carty Federal Habeas*, No. 06-614, slip op. at 142. The district court held that Carty failed to exhaust the claims raised for the first time in her Additional Further Response and that, in any case, her substantive claims were not meritorious.

Carty then moved for a COA. The district court granted Carty a COA on whether she failed to exhaust the claims that she raised for the first time in her Additional

Further Response[5] and on whether trial counsel rendered ineffective assistance by failing to notify Corona of his spousal privilege and by failing to produce more mitigation evidence during the punishment phase of trial. It denied a COA for all other claims. *See Carty v. Quarterman (Carty COA)*, No. 06-614, slip op. at 2-3 (S.D. Tex. Dec. 16, 2008). Carty now appeals the claims for which the district court granted her a COA.

II. STANDARDS OF REVIEW

We review de novo whether Carty exhausted available state court remedies and whether the state waived exhaustion. *See Taylor v. Cain*, 545 F.3d 327, 332-33 (5th Cir. 2008); *Wilder v. Cockrell*, 274 F.3d 255, 259 (5th Cir. 2001). We apply the same de novo review to Carty's claims of ineffective assistance of counsel. *See Richards v. Quarterman*, 566 F.3d 553, 561 (5th Cir. 2009); *Smith* v. *Quarterman*, 515 F.3d 392, 403 (5th Cir. 2008). Both types of claims present mixed questions of law and fact. *See Ward v. Dretke*, 420 F.3d 479, 486 (5th Cir. 2005) (ineffective assistance of counsel); *Wilder*, 274 F.3d at 259 (exhaustion). When examining mixed questions of law and fact, our de novo standard requires that we "independently apply[]the law to the facts found by the district court, as long as the district court's factual determinations are not clearly erroneous." *Ramirez v. Dretke*, 396 F.3d 646, 649 (5th Cir. 2005); *see also Wilder*, 274 F.3d at 259.

Our de novo review is governed by AEDPA. Under AEDPA, a federal court may not grant habeas relief after a state court adjudicates the merits of a claim unless that adjudication (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "Therefore, neither the district court nor this Court may grant a writ of habeas corpus based solely on a finding of error by a state court." *Evans v. Cockrell*, 285 F.3d 370, 374 (5th Cir. 2002). Yet, the AEDPA-mandated deference to state court decisions does not apply if the petitioner properly exhausted his claim by raising it in the state court, but the state court did not adjudicate that particular claim on the merits. *See Henderson v. Cockrell*, 333 F.3d 592, 598 (5th Cir. 2003). We instead review such claims de novo without applying AEDPAmandated deference. *Riley v. Cockrell*, 339 F.3d 308, 318 (5th Cir. 2003); *see also Jones v. Jones*, 163 F.3d 285, 299-300 (5th Cir. 1998) (applying de novo review to an ineffective assistance of counsel claim that the petitioner raised in state court, but the state court did not adjudicate on the merits). In this case, the CCA did not address Carty's claim of trial counsel's ineffective assistance in failing to inform Corona of his marital privilege. It adjudicated part, but not all, of her claim of ineffective assistance in failing to investigate and present additional mitigation evidence. We review under AEDPA's heightened standard the portion of Carty's claim of trial counsel's ineffective assistance in presenting mitigation evidence that the CCA adjudicated on the merits; the rest of her claims, including whether she exhausted them in state court, we review de novo.

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[5] As part of their briefing on the issue of exhaustion, both parties have addressed whether the state waived the defense

III. DISCUSSION

A. Exhaustion

Carty raised most of her present claims for the first time in her Additional Further Response.[6] The state habeas court did not address these claims, which raises the issue of whether Carty exhausted them in state court. Under AEDPA, [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). "This longstanding exhaustion requirement is not jurisdictional, but 'reflects a policy of federal-state comity . . . designed to give the State an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Anderson v. Johnson*, 338 F.3d 382, 386 (5th Cir. 2003) (quoting *Wilder*, 274 F.3d at 260). When undertaking review, "we ask not only whether a prisoner has exhausted his state remedies, but also whether he has properly exhausted those remedies, i.e., whether he has fairly presented his claims to the state courts." *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999); *see also Baldwin v. Reese*, 541 U.S. 27, 29 (2004) ("To provide the State with the necessary opportunity, the prisoner must fairly present his claim in each appropriate state court . . ." (quotation marks and citations omitted)); *Mercadel v. Cain*, 179 F.3d 271, 275 (5th Cir. 1999) ("The exhaustion requirement is satisfied when the substance of the federal habeas claim has been fairly presented to the highest state court."). To fairly present the claims, "'the applicant must present his claims in a procedurally correct manner." *Beazley v. Johnson*, 242 F.3d 248, 263 (5th Cir. 2001) (quoting *Deters v. Collins*, 985 F.2d 789, 795 (5th Cir. 1993)); *see also Mercadel*, 179 F.3d at 275 ("[A] claim is not exhausted unless . . . the applicant present[s] his claims before the state courts in a procedurally proper manner according to the rules of the state courts." (quotation marks and citations omitted)). Fair presentation does not entertain presenting claims "for the first and only time in a procedural context in which its merits will not be considered unless there are special and important reasons therefor." *Castille v. Peoples*, 489 U.S. 346, 351 (1989) (quotation marks omitted). The purposes of the exhaustion requirement "would be no less frustrated were we to allow federal review to a prisoner who had *presented* his claim to the state court, but in such a manner that the state court could not, consistent with its own procedural rules, have entertained it." *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000).

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[6] For the portion of Carty's claim related to trial counsel's deficient presentation of mitigating evidence that she raised in her initial application for habeas relief in state court, this discussion does not apply. We review that portion on the merits below.

Texas's habeas statute requires an inmate seeking relief from a judgment imposing a penalty of death to file an application for a writ of habeas corpus in the trial court, "returnable to the [CCA]," by the later of two dates: "the 180th day after [the appointment of counsel]" or "the 45th day after the date the state's original brief is filed on direct appeal." TEX. CODE CRIM. PROC. ANN. art. 11.071 § 4(a). This deadline is subject to a single, discretionary 90-day extension. *Id.* § 4(b). The state trial court is not authorized to consider any subsequent habeas application unless the applicant shows the statutory equivalent of cause and prejudice or actual innocence. *Id.* § 5(a). Texas courts usually treat an amended pleading filed after the deadline as a new habeas action: "If an amended or supplemental application is not filed within the time specified under Section 4(a) or (b), the court shall treat the application as a subsequent application under this section." *Id.* § 5(f). The state statute establishes detailed procedures for processing such subsequent applications. *See id.* § 5(b), (c).

Limiting habeas claims to those timely filed in the initial application encourages efficient, all-inclusive applications. *Ex parte Kerr*, 64 S.W.3d 414, 418 (Tex. Crim. App. 2002). As such, a dismissal for an abuse of the writ in the form of a tardy application is an adequate and independent state-law bar to federal review. *Whitaker v. Quarterman*, 200 F. App'x 351, 356-57 (5th Cir. 2006).

In this case, Carty timely filed her initial habeas application on August 6, 2003. After the filing period expired, the state trial court denied the British Government the opportunity to amend Carty's application without treating the amended application as a subsequent application pursuant to article 11.071 § 5(f). With the assistance of co-counsel, Carty nonetheless filed her Additional Further Response on November 1, 2004, raising new claims for the first time. The trial court and CCA did not address those claims; however, they also did not follow the procedures for handling subsequent applications as established in article 11.071 §§ 5(b), (c), and (f), and did not dismiss the Additional Further Response for abuse of the writ. Furthermore, although the state did not move to treat the Additional Further Response as a subsequent application, Carty did not raise with the state courts their failure to consider the claims contained in her Additional Further Response.

Carty does not and cannot argue that her Additional Further Response was timely; instead, she urges that the parties entered into an agreement (sanctioned by the state habeas court) to permit her to add new claims in that filing that article 11.071 § 4(a) would otherwise bar. As the parties have framed it, the exhaustion question has three components: (1) did the parties and state habeas court agree to permit late-filed claims; (2) under Texas law, can the parties extend the filing deadline by agreement; and (3) did the state waive its exhaustion defense.

For the first issue, the district court found that Carty did not show an agreement in fact to permit late-filed claims in the Additional Further Response. *Carty Federal Habeas*, No. 06-614, slip op. at 48 ("Nothing in the record . . . suggests that the parties and state habeas court agreed to suspend TEX. CODE CRIM. PROC. [ANN.] art. 11.071 § 5's limitation on tardy amendments."); *id.* at 53 ("Even if an agreement allowed her to file something, [Carty] has not shown that the parties agreed to suspend the application of TEX. CODE CRIM. PROC. [ANN. art.] 11.071 § 5(f), as was previously requested."). We hold that the district court's factual conclusion was not clearly erroneous.[7] Although Carty has pointed to some record evidence showing some agreement regarding co-

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[7] The district court based its decision in part on an affidavit presented by the state's federal habeas counsel, Neelu Sachdeva, who attested that "[t]here was no agreement between the State and habeas counsel concerning habeas counsel filing 'Additional Further Response to Respondent's Original Answer' and no agreement between the State and habeas counsel as to the substance of such document." Sachdeva, however, has not shown that she had firsthand knowledge of the meeting between Carty's habeas counsel and the state's counsel.

counsel's submission of the Additional Further Response, she has not pointed to sufficient evidence to call into question the district court's conclusion that there was no agreement to permit tardy claims in that document. While statements in Carty's Additional Further Response and by co-counsel during oral argument before the state habeas court show that her habeas counsel proceeded as if the claims would be permitted, those statements permit only the weakest of inferences of any agreement. Co-counsel's generic statements of timeliness are hardly exceptional and are no basis on which to conclude an agreement existed. On the other hand, the state's failure to object to those statements or to the new claims in general raises a stronger inference of an agreement, but that inference is counterbalanced by Carty's failure to follow-up with either state habeas court when both the trial court and the CCA did not rule on her new claims. Similarly, the state trial court's failure to submit the Additional Further Response to the CCA for review pursuant to article 11.071 § 5 also permits an inference that the new claims therein were not considered tardy by the trial court, but that inference is again counterbalanced by that court's and the CCA's decision not to rule on those new claims. Carty presents no other record evidence supporting her assertion that an agreement permitted her to file new claims in the Additional Further Response. Thus, Carty has failed to dislodge the district court's findings of fact. Having affirmed the district court's finding, we need not weigh the more difficult second issue—whether Texas statutory law permits the parties, with the tacit approval of the court, to agree to set aside the statutory deadline contained in article 11.071 § 4(a).[8]

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[8] For this issue, Carty argues that state habeas courts may set aside

Carty also argues that the state waived its exhaustion defense. Under AEDPA, the state may waive the exhaustion requirement through an express statement by counsel: "A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3). Although AEDPA requires an express waiver, it "does not require 'magic words' in order for a state to expressly waive exhaustion." *D'Ambrosio v.*

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the time line in certain circumstances, especially where the parties rely on the court. She cites cases in which courts have permitted or considered claims filed outside of the initial application. *See, e.g., Coleman v. Dretke*, 395 F.3d 216, 220 (5th Cir. 2004); *Ex parte Ramos*, 977 S.W.2d 616, 617 (Tex. Crim. App. 1998); *Ex parte Jennings*, Nos. AP-75,806, 75,807, 2007 WL 4377072, at *1 (Tex. Crim. App. Dec. 12, 2007); *see also Bagwell v. Dretke*, 372 F.3d 748, 755-56 (5th Cir. 2004); *Riley*, 339 F.3d at 318. These cases are distinguishable. In *Jennings*, 2007 WL 4377072, at * 1, the CCA treated the supplement to the application as a successive petition and concluded that it met an exception to the successive writ bar. Here, the CCA did not rule that Carty's Additional Further Response qualified under an exception. In *Ramos*, 977 S.W.2d at 617, the state habeas court miscalculated the deadline for filing an initial application, so the prisoner's initial application was timely according to the court order but not under § 4(a). Here, no such mistake occurred, and Carty timely filed her initial application. Finally, *Coleman*, 395 F.3d at 220, was not a death penalty case; thus, Texas Code of Criminal Procedure art. 11.07 (which does not contain deadlines), not article 11.071 (which contains deadlines), applied. Furthermore, in *Riley* and *Bagwell*, we defined some of the ways in which a petitioner may exhaust a claim, but did not consider whether the claims were properly before the state habeas court. At best, the cases cited by Carty stand for the unremarkable proposition that in certain circumstances that do not exist in fact in this case, state courts have carved exceptions to the time lines of article 11.071 § 4(a).

Bagley, 527 F.3d 489, 497 (6th Cir. 2008).[9] "The touchstone for determining whether a waiver is express is the clarity of the intent to waive." *Id.* In *Bledsue v. Johnson*, 188 F.3d 250, 254 (5th Cir. 1999), we considered whether such a waiver had occurred. There, the state admitted, in its original answer to the federal habeas petition, that "Bledsue has sufficiently exhausted his state remedies." *Id.* We held that "the state has waived any independent exhaustion argument, as well as the exhaustion argument included within the doctrine of procedural default." *Id.* In *McGee v. Estelle*, 722 F.2d 1206, 1213 (5th Cir. 1984) (en banc), we reached the opposite conclusion. In that case, we held that the state did not make an express waiver because "its pleading asserted only that it 'believed' that [the applicant] had exhausted state remedies." *Id.* Although we held that this was not an express waiver, we concluded that it was "at least the equivalent of failure to assert the defense of non-exhaustion." *Id.* We also approved of the Eleventh Circuit's treatment of a similar statement, which that court determined to be "closely related to an express waiver." *Id.* at n.22 (citing *Thompson v. Wainwright*, 714 F.2d 1495, 1502 (11th Cir. 1983)).

In this case, the parties dispute whether the state's statements and actions before the district court expressly waive exhaustion. The state argued to the district court in its motion for summary judgment that

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[9] In *D'Ambrosio*, the Sixth Circuit looked in depth at the concept of express waiver, and held that "[t]he warden expressly waived the exhaustion requirement because her counsel's conduct during the district court proceedings manifested a clear and unambiguous intent to waive the requirement." 527 F.3d at 495-96. It clarified that "this is not a case in which the State simply failed to raise the exhaustion requirement in the district court" and that the fact that "the warden participated in discovery and moved to expand the record" did not "indicate, by itself, that the warden expressly waived the exhaustion requirement, as [the applicant] argues." *Id.* at 497.

> All but one of Carty's claims appear to be exhausted. Nevertheless, Carty fails to establish that she is entitled to habeas relief. Carty's claim of trial court error based on *Crawford v. Washington*, 541 U.S. 36 (2004), was never raised in state court. As a result, the claim is unexhausted and procedurally defaulted. Carty cannot overcome this procedural hurdle where, as here, she does not acknowledge exhaustion deficiencies or attempt to establish cause and prejudice as might serve to excuse her default. For those remaining claims which appear exhausted, Carty fails to demonstrate that the state court's adjudication was both incorrect and objectively unreasonable, that her claims merit relief, or that relief is not precluded under *Teague v. Lane*, 489 U.S. 288 (1989).

In the section entitled "Statement Regarding Exhaustion," the state also announced that "[t]he Director believes that Carty's claim of trial court error under *Crawford v. Washington* is unexhausted." These express statements show that the state treated only one claim, not presently at issue on appeal, as unexhausted. The rest, including the claims on appeal, it expressly treated as exhausted.[10] Thus, the district court's cursory conclusion that the state has not explicitly waived exhaustion was erroneous as a matter of law. *See Carty Federal Habeas*, No. 06-614, slip op. at 52. The state clearly considered exhaustion as a defense and chose not to exercise that defense for the close issue of whether Carty exhausted the claims contained in her Additional Further Response. The state has waived exhaustion, but in any case, Carty's substantive claims lack merit.

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[10] The state does not argue that its assertion of the defense of failure to exhaust after prompting by the district court preserved that defense if it had already expressly waived it. The district court has the ability to *sua sponte* raise procedural defenses like failure to

B. Ineffective Assistance of Counsel

Carty contends that her trial counsel's assistance was ineffective. The Sixth Amendment guarantees a criminal accused the right to assistance of counsel, and "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Under the *Strickland* standard, the Sixth Amendment right to effective assistance of counsel "is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003). "Failure to make the required

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exhaust; however, in the face of an express—as opposed to inadvertent—waiver, the district court typically abuses its discretion by raising a waived defense. *See Magouirk v. Phillips*, 144 F.3d 348, 359 (5th Cir. 1998) ("A state's purposeful waiver may also pose an obstacle to *sua sponte* reliance upon a procedural default, and the nature of the state's alleged 'waiver' should be given consideration by the district court . . . . Where omission is the result of a purposeful or deliberate decision to forgo the defense, the district court should, in the typical case, presume that waiver to be valid.").

showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700.

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms," by reference to "all the circumstances." *Id.* at 688; *see also Sonnier v. Quarterman*, 476 F.3d 349, 357 (5th Cir. 2007) (same). "Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . ." *Strickland*, 466 U.S. at 688. In all cases, "[j]udicial scrutiny of counsel's performance must be highly deferential" and must avoid second-guessing. *Id.* at 689. We avoid the distorting effects of hindsight. *Dowthitt v. Johnson*, 230 F.3d 733, 743 (5th Cir. 2000). "We must be particularly wary of arguments that essentially come down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second-guessing." *Id.* (quotation marks and alterations omitted).

Sufficient prejudice requires a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694. The deficient assistance must be "so serious as to deprive [her] of a fair trial, a trial whose result is reliable." *Id.* at 687.

"It bears repeating that," where the state habeas court ruled on the petitioner's ineffective assistance of counsel claim, "the test for federal habeas purposes is not whether [the petitioner] made [the required] showing." *Schaetzle v. Cockrell*, 343 F.3d 440, 444 (5th Cir. 2003).

"Instead, the test is whether the state court's decision—that [the petitioner] did not make the Strickland-showing—was contrary to, or an unreasonable application of, the standards, provided by the clearly established federal law *(Strickland),* for succeeding on [the petitioner's ineffective assistance of counsel] claim." *Id.* With these standards in mind, we now turn to Carty's claims of ineffective assistance of counsel.

1. Failure to notify Corona of his marital privilege

Carty asserts that trial counsel rendered ineffective assistance by failing to interview Corona and notify him of his right to assert his marital privilege not to testify against Carty. Under Texas law, the spouse of the accused has the right to refuse to testify against the accused in a criminal case. TEX. R. EVID. 504(b)(1).[11] The privilege is the spouse's, not the accused's; the spouse may testify voluntarily for the state. *Id.*

Corona testified during the prosecution's case in chief. As discussed in greater detail above, he testified that Carty repeatedly claimed that she was pregnant, that none of those purported pregnancies resulted in the birth of a child, that he left her in May 2001, and that he did not believe Carty when she told him that she was pregnant in May 2001—shortly before she kidnaped and murdered Rodriguez. The prosecution emphasized his testimony to explain Carty's motive and provide the context for her otherwise inexplicable crime.

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[11] Rule 504(b)(1) provides: "In a criminal case, the spouse of the accused has a privilege not to be called as a witness for the state." "The privilege not to testify may be claimed by the person or the person's guardian or representative but not by that person's spouse." TEX. R. EVID. 504(b)(3).

If permitted to refuse to testify, Corona attested that he would have exercised the option:

> I did not want to get involved in the trial or to testify against Linda, but when the prosecutor's office called me to testify, I thought that I had to testify and that I had no other choice. Neither Mr. Gerry Guerinot nor Ms. Windi Akins talked to me before I testified at Linda's trial. It was never explained to me before I testified that in Texas there is a marital privilege and that under that privilege I had the right to refuse to testify at Linda's trial. If Linda's attorneys had explained to me or informed me about this marital privilege, I would have refused to testify at Linda's trial unless Linda's attorneys had asked me to do so.

Trial counsel neither informed Corona of the potential availability of a marital privilege nor interviewed him to establish the factual predicate. Although Corona was on the state's witness list, Guerinot admitted that, "[i]n my representation of Linda, I did not contact her husband Jose Corona prior to trial. I assumed that my investigator John Castillo would speak with him." Castillo, however, "never spoke to Corona." Guerinot also conceded that "I never attempted to inform Jose Corona that he had the right as her husband to not testify."

The district court held that "[z]ealous counsel should have interviewed Corona before trial and provided him the information necessary to try exerting [sic] the marital exemption." *Carty Federal Habeas*, No. 06-614, slip op. at 97. It held, however, that trial counsel's deficiency did not sufficiently prejudice Carty's defense to warrant relief. We agree that although trial counsel performed objectively unreasonably by failing to interview Corona to determine if he could or would assert a marital privilege, that omission did not prejudice Carty's defense.

The state does not disagree that trial counsel's failure to inform Corona of the potential availability of the marital privilege fell below the objective standard of reasonableness; instead, it argues only that Carty suffered no *Strickland* prejudice as a result of trial counsel's deficient investigation. The state provides two reasons why Carty was not sufficiently prejudiced, both of which she disputes. First, Corona was not Carty's common-law husband, so the state trial court would not have permitted him to assert the marital privilege. Second, in any case, Corona's testimony did not render the jury's guilty verdict unreliable.

Both Corona and Carty agree that they shared a common-law marriage. "Common law marriages have been recognized in Texas since 1847." *Russell v. Russell*, 865 S.W.2d 929, 931 (Tex. 1993). The elements of a common-law or informal marriage, as codified in § 2.401 of the Texas Family Code, are "(1) an agreement to be married, (2) after the agreement, the couple lived together in [Texas] as husband and wife, and (3) the couple represented to others that they were married."

Id. at 932.[12] "Proof of cohabitation and representations to others that the couple are married may constitute circumstantial evidence of an agreement to be married." *Id.* at 933.

The district court held that "the record does not show that, given the information he had, that trial counsel could have made a plausible argument that would allow Corona to exert [sic] his marital privilege." *Carty Federal Habeas*, No. 06-614, slip op. at 96; *see also id.* at 97 ("[T]he mixed record does not suggest that the trial court would have allowed Corona to avoid testifying."). The district court based its conclusion in part on the record of mixed statements by Carty and Corona, on Carty's statements about the termination of their relationship after Corona moved out, and on the absence of prior attempts to authenticate officially their marriage or to seek a divorce.

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[12] As currently codified, the Texas statute establishing informal marriage provides:

> (a) In a judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that:
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> . . .
>
> > (2) the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.
>
> (b) If a proceeding in which a marriage is to be proved as provided by Subsection (a)(2) is not commenced before the second anniversary of the date on which the parties separated and ceased living together, it is rebuttably presumed that the parties did not enter into an agreement to be married.

TEX. FAM. CODE ANN. § 2.401. Regarding the presumption contained in subsection (b), the state's prosecution of Carty was commenced prior to the second anniversary of the date that Carty and Corona separated; however, the state habeas application and present federal habeas litigation were not commenced within that time frame. Because the state does not argue that the adverse presumption contained in § 2.401(b) applies to this case, we do not rule on its applicability to the present case.

The district court in part misconceives Texas law as it applies to the evidence in this case. Although Carty's and Corona's mutual conclusory assertions that they have a common-law marriage "[are] not sufficient, standing alone, to establish a common law marriage," *Tompkins v. State*, 774 S.W.2d 195, 209 (Tex. Crim. App. 1987), it is undisputed that they lived together for approximately three years, from 1999 to 2001. The record contains evidence of multiple representations to others that they were married during the period of their cohabitation. For example, Corona attested that, during the period of their co-habitation, "I would introduce Linda as my wife, and she would introduce me as her husband." The difficult prong, as nearly always is the case, is the first: whether there was an agreement to be married. There is an indistinct record as to this prong. Carty has pointed the court to no direct evidence or statements that she and Corona agreed to be married. Yet, such an agreement can be inferred from the spouses' public statements and their cohabiting. *See Russell*, 865 S.W.2d at 932. The fact that both Carty and Corona assert that they had a common-law marriage, although not dispositive, lends credence to their claim—typically, the spouses dispute their status.

The evidence to the contrary, on which the district court relied, is not pertinent to the analysis in this case. While some statements show that they may not have always referred to themselves as being married, Texas law does not require that the purported spouses always refer to themselves as married—undertaking each requirement of informal marriage consummates the union and renders additional or contradictory statements superfluous. *See id.* Even if Carty may have been planning a wedding ceremony, the intention to have a formal proceeding does not automatically disprove the existence of a common-law marriage. *See Hinojos v. R.R. Ret. Bd.*, 323 F.2d 227, 231 (5th Cir. 1963) ("[T]here is nothing necessarily inconsistent with an agreement presently to enter into a common-law marriage and an intention later to have performed a ceremonial marriage."); *Tompkins*, 774 S.W.2d at 209 ("The fact that they might have intended to go through a ceremonial marriage at sometime in the future does not necessarily negate the inference that they believed that they were married common law."). Nor, as the district court erroneously referenced, does a later separation, a statement by one or both spouses that no marriage exists, or the spouses' failure to otherwise authenticate their marriage disprove or dissolve an established common-law marriage. *See State v. Mireles*, 904 S.W.2d 885, 889 (Tex. App.—Corpus Christi 1995, pet. ref d) ("[O]nce a common law marital status exists, it, like any other marriage, may be terminated only by death or a court decree; once the marriage exists, the spouses' subsequent denials of the marriage do not undo the marriage.").

On this record, considering Carty's and Corona's widely disseminated representations that they were married and the fact that during trial, even the prosecutors claimed that they were married,[18] Carty may well have established that she was married to Corona and that, but for her counsel's ineffective assistance, Corona would have exercised his marital privilege not to testify. Ultimately, however, we need not decide the question whether Carty and Corona were married because Carty fails on the prejudice prong of her ineffective assistance claim.

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[18] It is difficult for the state to now complain that Carty's assertion is surprising.

Carty bears the burden of showing a reasonable probability of a different result had Corona not testified. Although this is a close case, she has not made the requisite showing that his testimony rendered her conviction "fundamentally unfair or unreliable." *Ransom v. Johnson*, 126 F.3d 716, 721 (5th Cir. 1997) (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993)). Corona's testimony was undoubtedly damaging to Carty's defense, but it did not render her conviction fundamentally unreliable. His testimony provided motive and context for the crime. He testified that Carty wanted to have a child and frequently lied about being pregnant. He provided the best evidence of their break up a mere two weeks before Rodriguez's murder, of her statements at that time that she was pregnant, and of his belief that she was lying about being pregnant. Corona also testified that Carty called him numerous times on May 15—the day prior to the kidnaping and murder—and on May 16—the day of the crimes—to inform him that she was having his baby boy. It *is* an obvious and no small inference that Carty kidnaped Rodriguez's baby and killed Rodriguez to prove to Corona that she had birthed his son and thereby reestablish their relationship.

The prosecutors emphasized Corona's testimony in their closing remarks, particularly "that every time [he] tried to end [their relationship], Carty announced she was pregnant" and that "[w]hat [Carty] wanted, . . . needed, was [the baby] because her life was falling apart and she needed the baby to bring it back together again." The state concedes that "Corona provided motive and context for what would otherwise be a wholly inexplicable crime"—it was the "evidence of what drove the defendant to commit such a brutal crime." As Guerinot summarized, Corona's testimony "hurt Linda's case." The district court thus appropriately concluded that Corona's testimony "would be persuasive to the jury" and "was obviously important to the prosecution."

Yet, while Corona's testimony may have been damaging to Carty's defense, the *Strickland* prejudice test carries a higher standard. Trial counsel's failure to notify Corona that he did not need to testify must have "a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture." *Strickland*, 466 U.S. at 695-96. We affirm the district court's conclusion that Corona's testimony provided nuance to the case but did not alter the entire evidentiary picture. The evidence of Carty's guilt was overwhelming, even absent Corona's testimony, and his testimony, in most regards, only corroborated other sources. Corona's testimony was not necessary to prove, let alone relevant to, any of the elements of capital murder. More importantly, trial testimony from witnesses other than Corona revealed, *inter alia*, that in the days leading up to the kidnaping and murder, Carty told Mathis, Meyers, and Bancroft that she was pregnant. Neither Meyers nor Bancroft, however, thought she looked pregnant. Carty had also acquired baby items that she stored in her car, despite the fact that she was not pregnant. In addition, Carty masterminded the planned kidnaping—recruiting her accomplices, inviting them into her home to see the layout (which mirrored the target home), calling the kidnapers during the abduction, and then entering

Rodriguez's home to take the baby, telling them repeatedly that she needed the baby, and directing them to tie up Rodriguez and put her in the trunk of the car—and killed Rodriguez by placing a bag over her head. While this other evidence may not have shown as directly *why* Carty wanted Rodriguez's baby, it nonetheless shows that she wanted the baby.[14] Although Corona's testimony was obviously damaging to Carty's defense, we conclude, based on the totality of the evidence, that Carty has not shown that but for trial counsel's deficient failure to advise Corona of his marital privilege there was a reasonable probability that she would not have been convicted of capital murder.

2. Failure to investigate and present additional mitigation evidence

Carty also argues that trial counsel was ineffective because counsel failed to investigate or present significant mitigating evidence. In *Strickland*, the Supreme Court addressed an ineffective assistance claim based on an attorney's failure to investigate and present mitigation evidence. The Court "noted that counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Sonnier*, 476 F.3d at 358 (citing *Strickland*, 466 U.S. at 691); *see also Miniel v. Cockrell*, 339 F.3d 331, 344 (5th Cir. 2003) ("[G]enerally accepted standards of competence require that counsel conduct an investigation regarding the accused's background and character."). "Mitigating evidence that illustrates a defendant's character or personal history embodies a constitutionally important role in the process of individualized sentencing, and in the ultimate determination of whether the death penalty is an appropriate punishment." *Riley*, 339 F.3d at 316. "[C]ounsel should consider presenting . . . [the defendant's] medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Sometimes, however, [i]nvestigations into mitigating circumstances may reasonably be limited where he defendant fails to call witnesses to his lawyer's attention." *Wiley v. Puckett*, 69 F.2d 86, 99 (5th Cir. 1992). As the Supreme Court explained in *Strickland*,

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[14] In fact, trial counsel's unimpeached trial strategy was to challenge the evidence showing Carty's intent to kill, not her involvement in the kidnaping and murder. Corona's testimony was thus not relevant to the most prominently disputed element of Carty's case.

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information . . . . In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions . . . .

466 U.S. at 691. Thus, although a defendant's obstreperousness will not justify a complete failure by appointed counsel to investigate and present mitigating

evidence in all cases, *see Sonnier*, 476 F.3d at 358 ("[The defendant's] refusal to consent to their undertaking more extensive and in-depth discussions with his family and acquaintances to determine the nature and extent of the mitigation evidence available was not reasonable grounds for their failure to do so."), "[t]he scope of the attorney's duty to investigate may be limited by a defendant's lack of cooperation," *Randle v. Scott*, 43 F.3d 221, 225 (5th Cir. 1995).

When considering *Strickland* prejudice, we review "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—in reweighing it against the evidence in aggravation." *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000); *see also Wiggins*, 539 U.S. at 534 ("[W]e reweigh the evidence in aggravation against the totality of available mitigating evidence."); *Strickland*, 466 U.S. at 695 ("[T]he question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."). In this re-weighing, the brutality of the crime is relevant but does not automatically trump additional mitigating evidence. *See Gardner v. Johnson*, 247 F.3d 551, 563 (5th Cir. 2001).

Carty asserts that trial counsel failed to investigate or present mitigating testimony from Corona, Mathis, Dr. Brown, Carty's family and friends, and acquaintances on St. Kitts and failed to investigate and present that Carty suffered from posttraumatic stress disorder after being the victim of a sexual assault, becoming pregnant, and giving her baby up for adoption.

The state habeas court ruled on some of these claims. In particular, in her initial state habeas application, Carty raised trial counsel's failure to investigate and present additional mitigating testimony from her family members who testified and any mitigating testimony from her other family members. The CCA concluded that trial counsel was not ineffective: "Trial counsel cannot be considered ineffective for an alleged failure to investigate and present mitigating evidence . . . in light of counsels' investigation and presentation of thorough punishment evidence, including testimony concerning [Carty's] family background and support, positive personal characteristics, positive activities, work ethic, and her parenting abilities . . . ." The court also concluded that Carty had not shown prejudice: "[Carty] fails to show harm, if any, so that the outcome of the proceedings would have been different if the witnesses proffered on habeas [[her] mother, daughter, two sisters, and brother] had been presented at trial, based on the fact that three of the proffered witnesses [mother, daughter, sister] actually testified at trial and that the proffered testimony was essentially the same as evidence presented at trial." Bolstering its conclusion, the court weighed Carty's and her family's lack of cooperation: "[Carty] fails to show ineffective assistance of trial counsel based on the alleged failure to investigate and present mitigating evidence, especially in light of [her] repeated failure to cooperate with counsel, [her] refusal to give counsel the name of potential witnesses, [her] instruction not to contact her family, and the failure of [her] daughter to appear in court without the trial court issuing a writ of attachment for her appearance." As noted above, we review the state court's conclusions and the factual findings contained therein under AEDPA's deferential standard. *See* § 2254(d). For Carty's remaining claims, we review de novo. *See Henderson*, 333 F.3d at 598.

Carty asserts that trial counsel failed to investigate and present mitigation testimony from her family. Trial counsel presented some mitigating evidence, including the testimony of Carty's mother Enid, sister Isalyn, and daughter Jovelle. Carty offers that, with better preparation, these witnesses would have presented a more vivid picture of Carty as a generous and caring human being. *See Walbey v. Quarterman*, 309 F. App'x 795, 804 (5th Cir. 2009) ("[T]he mitigating evidence omitted by [trial counsel] during [the applicant's] sentencing overwhelms the 'scant' evidence, 'bereft in scope and detail,' that was presented."). Although trial counsel did not conduct extensive interviews with these witnesses, they obtained a writ of attachment to secure Jovelle's testimony, and, moreover, Carty's complaint about trial counsel's preparation of these witnesses boils down to a matter of degrees—she wanted these witnesses to testify in greater detail about similar events and traits. We agree with the district court that Carty has not shown any deficiency in trial counsel's preparation of Enid, Isalyn, and Jovelle. *See Dowthitt*, 230 F.3d at 743.

Carty also asserts that trial counsel performed ineffectively by not contacting Carty's other family members, including Sonia Carty Jackson, Verna Connor, Yvette Jacqueline Carty-Innes, Boyce Carty, and Clarence Eugene Carty—all of whom now attest that they were willing to testify about Carty's dynamic life, intelligence, and generosity. Such testimony would have overlapped considerably with the testimonies of Enid, Isalyn, and Jovelle. Carty's claim is again that trial counsel did not present enough mitigating evidence. We agree with the district court that Carty has not shown any deficiency related to her proffer of cumulative evidence. *See id.* In addition, with the exception of Verna, Carty refused to notify trial counsel about her relatives: Guerinot attested that "Ms. Carty did not provide me with names of people who would testify on her behalf. Ms. Carty did not even want her family to testify but I approached them anyway because I thought their testimony was important." Carty's own actions and statements undermine her claim of ineffective assistance related to mitigating testimony from other family members. *See Randle*, 43 F.3d at 225; *Wiley*, 969 F.2d at 99. The CCA's conclusion—that trial counsel's handling of the witnesses who testified and failure to contact Carty's other relatives, who would have testified similarly, did not prejudice Carty's mitigation defense—was not an unreasonable determination of the facts in light of the evidence presented in the punishment phase and was not an unreasonable application of or contrary to clearly established, Supreme Court-determined federal law. *See Neal v. Puckett*, 286 F.3d 230, 247 (5th Cir. 2002) (deferring to state habeas court determination that "the additional evidence was not substantial enough to outweigh the overwhelming aggravating circumstances" where [[al]though the additional mitigating evidence was of a significantly better quality than that actually presented, much of it was similar in nature to the original evidence").

For the remainder of Carty's claim of ineffective assistance of counsel based on failure to investigate and present mitigating evidence, which we review de novo, we conclude that Carty has failed to show *Strickland* prejudice. The omission of Corona's and Mathis's proffered punishment-phase testimony was not prejudicial. Neither trial counsel nor the state has offered sufficient justification for trial counsel's failure to interview Corona or Mathis or to place them on the stand for purposes of mitigation. Corona undisputedly resided with Carty for three years prior to the kidnaping and murder and was Carty's common-law husband, while Mathis was Carty's DEA agent with direct knowledge of her work for the government. Corona attests that he would have testified to the jury that Carty "did not deserve the death penalty" and that he did not "believe she is an aggressive person or a threat to society." Mathis attests that "[t]he Linda I know is not a violent person, let alone a cold-blooded murderer." Mathis would also have provided some favorable if mixed testimony about her performance as an informant for the DEA. Based on the totality of the evidence, and weighing the relatively unpersuasive nature of Corona's and Mathis's testimony, some of which would have been cumulative,[15] against the circumstances of the crime and other evidence, Carty has failed to show that their testimony would have resulted in a life sentence.

Carty next asserts that trial counsel rendered ineffective assistance by failing to investigate or procure testimony from her friends and acquaintances on St. Kitts. The state does not dispute that these witnesses could show that Carty was "well-liked and well-known," "involved in church and politics," a "good teacher," and not "violent or aggressive or even rowdy" while growing up and working in St. Kitts.[16] Indeed, these witnesses would have provided a much more nuanced and detailed vision of Carty's life and contributions to the St. Kitts community. *See Riley*, 339 F.3d at 316. Yet, most, although not all, of Carty's supporters on St. Kitts had little contact with Carty in the two decades since she left there—as the district court noted, the affidavits "have been prepared by people removed both in time and geographic location from her life at the commission of the capital murders." *Carty Federal Habeas*, No. 06-614, slip op. at 112. In fact, their proffered testimonies of her good character appear "weak and stale" when compared to the person she had become—a person who stole cars; organized drug deals, burglaries, and kidnapings; and committed murder. *Id.* Furthermore, the testimonies of Enid, Isalyn, and Jovelle—based on more recent observations and interactions with Carty in Texas—presented at least some of the proffered information to the jury. And, again, Carty's obfuscation contributed to trial counsel's alleged deficiency; she did not inform trial counsel that she was a foreign national or provide counsel with her contacts in St. Kitts. Although the proffered testimonies would have given more detail and more focus to the mitigating evidence, in light of the totality of the evidence presented at trial, they were not of sufficient quality and force to establish a reasonable probability that, had the jury heard them, it would have elected to impose a life sentence.

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[15] Mathis's testimony would have been largely cumulative of his trial testimony. For example, Mathis testified during the guilt/innocence phase of trial that "I've known Linda for a long time and I did not believe that she could do something like this."

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[16] Each of the potential witnesses attested that, if asked, he or she would have traveled to Texas to testify during Carty's trial. The St. Kitts consulate stated that it would have assisted with visas and travel. Thus, we assume that the witnesses would have testified if called. *See Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985) ("In order for the appellant to demonstrate the requisite *Strickland* prejudice, the appellant must show not only that this testimony would have been favorable, but also that the witness would have testified at trial.").

Carty adds that trial counsel was ineffective for failing to investigate and present mitigating evidence showing that she was the victim of a rape and that she became pregnant as a result of that rape, birthed a child, gave it up for adoption, and now suffers from chronic post-traumatic stress disorder as a result. Carty did not present this mitigation argument to the district court. *See Carty Federal Habeas*, No. 06-614, slip op. at 88. At most, she argued that her rape was a justification for why she was uncooperative with trial counsel. Thus, Carty has abandoned this line of argument. *See Johnson v. Puckett*, 176 F.3d 809, 814 (5th Cir. 1999) ("We have repeatedly held that a contention not raised by a habeas petitioner in the district court cannot be considered for the first time on appeal from that court's denial of habeas relief.").[17]

Finally, Carty argues that trial counsel ineffectively prepared Dr. Brown for testimony and cross-examination about Carty's future dangerousness during the punishment phase. Because neither we nor the district court granted Carty a COA on this issue, we lack jurisdiction to consider this claim. *See* 28 U.S.C. § 2253(c); *Sonnier v. Johnson*, 161 F.3d 941, 946 (5th Cir. 1998) ("Compliance with the COA requirement of 28 U.S.C. § 2253(c) is jurisdictional . . . .").[17]

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[17] Even if Carty did not abandon this claim, she has not shown either deficient performance or prejudice. Carty did not inform trial counsel that she gave birth to a child that was conceived as a result of rape. And, the jury heard testimony and argument about her rape

C. Denial of An Evidentiary Hearing

Lastly, Carty argues that the district court abused its discretion by denying her request for an evidentiary hearing on the exhaustion issue. Having considered Carty's proffer in connection with that request, we perceive no abuse of discretion in the district court's ruling. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief.").

IV. CONCLUSION

For the above-stated reasons, we AFFIRM the district court's judgment.

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and resulting child birth, even as it related to mitigation. For example, after Dr. Brown testified that she informed him about the rape, trial counsel stated during closing arguments:

> Linda Carty, according to the report by Dr. Brown—you may say, as far as mitigating goes, you may ask yourself, "You know what, I wonder if the fact that she reported that she gave birth to a child that was the result of a sexual assault and gave that up for adoption, if that may have triggered something to cause her to do what she did?" I mean, it could be anything from any source whatsoever. And the law does not require that you leave your common sense out there on the courthouse steps.

APPENDIX B

FILED August 28, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-70049

LINDA ANITA CARTY,
Petitioner - Appellant,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent - Appellee.

Appeal from the United States District Court
for the Southern District of Texas, Houston Division
No. 06-614

Before KING, DENNIS, and OWEN, Circuit Judges.

PER CURIAM:*

A Texas jury convicted and sentenced to death petitioner–appellant Linda Anita Carty for the intentional murder of Joana Rodriquez during the course of a kidnaping of Rodriguez and her newborn son. State appellate courts affirmed the conviction and sentence and denied post-conviction relief. Carty then brought this federal habeas petition under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C.

§ 2254. The district court denied substantive relief, dismissed Carty's case, and denied a certificate of appealability ("COA") for most of her claims. It granted a COA for two substantive claims. Carty's appeal of those two claims is now before us, as is Carty's request for an additional COA for many of the other claims she unsuccessfully raised in the district court. We deny Carty's request for an additional COA, grant her request for oral argument regarding the two substantive claims, and reserve opinion on those claims until after oral argument.

I. FACTS AND PROCEDURE

The district court's exhaustive opinion more than adequately documents the factual background and procedural development of this case. *See Carty v. Quarterman* (*Carty Federal Habeas*), No. 06-614, slip op. at 5–35 (S.D. Tex. Sept. 30, 2008). Here, we recite the facts and procedure in cursory form to provide a framework for our denial of an additional COA.

Carty, a foreign national citizen of St. Kitts and thus the United Kingdom, was indicted by a Texas grand jury for the kidnaping and intentional murder of Rodriguez. Although Carty originally hired her own attorney, when her family could not pay his fees, the Texas trial court appointed Jerry Guerinot and Wendy Akins to represent her (collectively, "trial counsel"). Trial counsel hired investigator John Castillo and psychologist Dr. Jerome Brown to aid Carty's defense.

The trial proceeded in two phases: guilt/innocence and punishment. During the guilt-innocence phase, the prosecution called, *inter alia*, Jose Corona, with whom Carty had previously resided and who may have been Carty's common-law husband; Charlie Mathis, an agent of the Drug Enforcement Agency and for whom Carty had previously worked as an informant; and Josie Anderson, Marvin Caston, Chris Robinson, and Zebediah Combs, all of whom had some role in the kidnaping, although the parties currently contest their statuses as accomplices. The jury returned a verdict of guilty on the charge of capital murder. During the subsequent punishment phase, Dr. Brown testified on behalf of Carty, as did members of her family. The jury answered all three of Texas's "special issues" in favor of sentencing Carty to death.

The Texas Court of Criminal Appeals affirmed Carty's conviction and sentence. *See Carty v. State*, No. 74295, 2004 WL 3093229 (Tex. Crim. App. Apr. 07, 2004). Carty then applied for state post-conviction relief. Carty raised a few of her presently asserted claims in her initial application for post-conviction relief but most others in her Further Additional Response (her third amended response to the government's answer). The parties dispute whether they—along with the state habeas court—agreed to permit Carty to raise new claims in that response. The state habeas court reviewed the claims she raised in her initial application and recommended that the Court of Criminal Appeals deny those claims, *see Ex Parte Carty*, No. 877592-A, order (Tex. Dist. Ct. Dec. 2, 2004), a recommendation that the Court of Criminal Appeals adopted, *see Ex Parte Carty*, No. WR-61,055-01, slip op. 2 (Tex. Ct. Crim. App. Mar. 2, 2005). Neither court addressed the claims she raised for the first time in her Additional Further Response.

Having found no success in state court, Carty then filed an application in federal district court for a writ of habeas corpus under § 2254. Carty presented approximately twenty issues to the district court, which concluded that

Carty failed to raise a triable issue of her entitlement to relief, granted the state's motion for summary judgment, and dismissed the case. *See Carty Federal Habeas*, No. 06-614, slip op. at 142. Carty then moved for a COA. The district court granted Carty a COA on whether she failed to exhaust the claims that she raised for the first time in her Further Additional Response and on whether trial counsel rendered ineffective assistance by failing to notify Corona of his spousal privilege and by failing to produce more mitigation evidence during the punishment phase of trial. It denied a COA for all other claims. *See Carty v. Quarterman* (*Carty COA*), No. 06-614, slip op. at 2–3 (S.D. Tex. Dec. 16, 2008). Carty now appeals the claims for which the district court granted her a COA and moves us to grant a COA on her additional claims. At this time, we rule only on her motion for an additional COA and deny it.

II. STANDARDS OF REVIEW

Carty's motion is governed by AEDPA. Under AEDPA, a state habeas petitioner may appeal a district court's dismissal of his petition only if the district court or the court of appeals first issues a COA. 28 U.S.C. § 2253(c)(1)(B); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (describing a COA as a "jurisdictional prerequisite" without which "federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners"). In determining whether to grant a petitioner's request for a COA, we limit our "examination to a threshold inquiry into the underlying merit of [the petitioner's] claims." *Miller-El*, 537 U.S. at 327 (citing *Slack v. McDaniel*, 529 U.S. 473, 481 (2000)). "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Id.* at 336.

We will grant a request for a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Typically, where the district court denies a habeas petition at least in part on procedural grounds without reaching the applicant's underlying constitutional claim, or by reaching the underlying constitutional claim by denying it in the alternative, "a COA should issue when the [applicant] shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. In this case, the district court concluded that the claims that Carty raised for the first time in her Further Additional Response were not exhausted in state court, a procedural ruling precluding relief on those claims; however, it granted a COA for that ruling. *See Carty COA*, No. 06-614, slip op. at 2 ("[G]iven the complexity of the record and the intricacies of Texas habeas law, the [district court] finds that the exhaustion issue 'deserves encouragement to proceed further.' The [district court], therefore, will grant a COA on the question of whether [Carty] sufficiently exhausted state court remedies.").[1] Thus, in order to grant a COA for one of Carty's additional substantive claims, we must conclude only that Carty has demonstrated the threshold showing for that substantive claim.[2] *See Miller-El*, 537 U.S. at 327. "Although the issuance of a COA 'must not be *pro forma* or a matter of course,' the petitioner satisfies the burden under § 2253(c) by 'demonstrat[ing] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005) (alteration in original) (quoting *Miller-El*, 537 U.S. at 337–38). "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 338. "[A]ny doubt as to whether a COA should issue in a death-penalty case must be resolved in favor of the petitioner." *Pippin*, 434 F.3d at 787.

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[1] Carty also seeks a COA for the district court's holding that the procedural default that resulted from her failure to exhaust was not subject to certain exceptions. Our disposition on Carty's appeal of the merits of the exhaustion issue will necessarily resolve the correctness of the district court's underlying procedural default holding. We consider as a separate matter whether to grant Carty's request for a COA on the applicability of exceptions to procedural default.

In determining whether the district court's denial of Carty's petition for a COA on her additional claims was debatable, we must keep in mind the deferential standard of review that AEDPA requires a district court to apply to the state courts' rulings. *See Brown v. Dretke*, 419 F.3d 365, 371 (5th Cir. 2005) ("With respect to the review of factual findings, AEDPA significantly restricts the scope of federal habeas review."). Under AEDPA,

> a federal court is not to grant a writ of habeas corpus "with respect to any claim that was adjudicated on the merits in State court proceedings" unless it determines that the state court's adjudication "resulted in a decision that was contrary

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[2] Where a district court held that a different procedural bar applied to prevent consideration of the merits of one of Carty's claims, we apply the appropriate standard to both the procedural and substantive holdings. *See Slack*, 529 U.S. at 484.

> to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

Pippin, 434 F.3d at 787 (quoting 28 U.S.C. § 2254(d)(1)). Moreover, "'a determination of a factual issue made by a State court shall be presumed to be correct' unless the petitioner rebuts the presumption 'by clear and convincing evidence.'" *Id.* at 788 (quoting 28 U.S.C. § 2254(e)(1)). "This presumption of correctness attaches not only to explicit findings of fact, but also to 'unarticulated findings which are necessary to the state court's conclusions of mixed law and fact.'" *Id.* (quoting *Pondexter v. Dretke*, 346 F.3d 142, 148 (5th Cir. 2003)).

III. DISCUSSION

Carty requests a COA for numerous substantive claims and for her claim that exceptions to procedural default apply to the claims she raised for the first time in her Further Additional Response.

A. Substantive claims

Carty raises six types of substantive challenges to her conviction or sentence.[3]

1. Ineffective assistance of counsel

Carty contends that her trial counsel's assistance was ineffective. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Under the *Strickland* standard, the Sixth Amendment right to effective assistance of counsel "is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms," by reference to "all the circumstances." *Id.* at 688. "Judicial scrutiny of counsel's performance must be highly deferential" and must avoid second-guessing. *Id.* at 689. Prejudice requires a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 694.[4] In light of these standards, we now consider Carty's claims of ineffective assistance of counsel.

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[3] Carty presented the majority of these claims in her Further Additional Response, so there were no state court holdings to which the district court could apply the AEDPA mandated standard of deference. *See* § 2254(d); *Pippin*, 434 F.3d at 787. We will note the few claims for which the state court provided a holding.

First, Carty alleges that trial counsel rendered ineffective assistance through deficient pre-trial preparation by (1) failing to interview Mathis; (2) failing to conduct inquiries of Carty's family and her life in St. Kitts; and (3) failing to interview and prepare to cross-examine state witnesses. Carty has failed to identify any testimony or information that trial counsel should have elicited from Mathis that would have been admissible, relevant, and noncumulative. *See United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989) ("A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial."). She has similarly failed to show that testimony about her character from her family and distant acquaintances in St. Kitts was admissible and would have altered the guilt/innocence phase of trial.[5] Carty has additionally failed to show that Robinson and Combs, who were also charged with crimes, would have agreed to be interviewed by trial counsel or that they had any knowledge that was not otherwise disclosed to the jury during trial. Thus, the district court's holding—that trial counsel's performance did not fall below an objective standard of reasonableness—is not debatable by jurists of reason.

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[4] "It bears repeating that," where the state habeas court had the opportunity to rule on the petitioner's ineffective assistance of counsel claim, "the test for federal habeas purposes is *not* whether [the petitioner] made [the required] showing." *Schaetzle v. Cockrell*, 343 F.3d 440, 444 (5th Cir. 2003). "Instead, the test is whether the state court's decision—that [the petitioner] did *not* make the *Strickland*-showing—was contrary to, or an unreasonable application of, the standards, provided by the clearly established federal law (*Strickland*), for succeeding on [the petitioner's] IAC claim." *Id.*

Second, Carty claims that trial counsel provided ineffective assistance by failing to call Dr. Brown to testify during the guilt/innocence phase and by failing to prepare him for cross-examination during the punishment phase. Carty has failed to show that Dr. Brown could have testified to his proffered opinions—that Carty's psychological profile did not fit the crime, that bandage scissors could not cut human flesh, and that Carty could not have passed the baby off as her own—during the guilt/innocence phase. Dr. Brown's opinion about Carty's psychological profile was not helpful to the jury because the jury was ultimately charged with deciding whether Carty kidnaped and killed Rodriguez with the requisite intent. Dr. Brown's analysis of her psychological profile based on later observations in a controlled setting would not have been helpful to the jury in determining whether she committed these crimes and, in any case, that Carty's later psychological profile suggested that she would not have committed these crimes pales in comparison to the substantial evidence that she did so. The only case relied upon by Carty permits testimony regarding the defendant's psychological profile in the punishment phase, not the guilt/innocense phase. *See Griffith v. State*, 983 S.W.2d 282, 288 (Tex. Crim. App. 1998). Next, Dr. Brown's opinion that bandage scissors could not cut human flesh was not relevant to the prosecution's use of that evidence—to provide evidence of Carty's willingness to do anything to kidnap the baby—and was not necessary because trial counsel presented that argument to the jury, which did not need expert testimony to reach that conclusion. Finally, that Carty could not have passed the baby off as her own due to its ethnicity is not relevant to whether she wanted to do so, ignores Corona's ethnicity, and ignores Carty's statements that Rodriguez was pregnant with Corona's child. Regarding cross-examination, an issue that Carty raised in state habeas court, she has failed to rebut the fact that Dr. Brown was familiar with her case, characteristics, and crimes, even if he did not know her theory of the case, and has failed to show any prejudice arising from the alleged deficient preparation. Carty has failed to rebut with clear and convincing evidence the state habeas court's finding that the prosecutor properly questioned

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[5] The district court granted a COA on whether trial counsel should have conducted more searching inquiries of Carty's family and of her life in St. Kitts to uncover mitigation evidence for use in the punishment phase of trial.

Dr. Brown about hypothetical characteristics and has failed to show that the state habeas court unreasonably applied federal law to conclude that trial counsel was not ineffective during Dr. Brown's cross-examination. Overall, the district court's holding—that trial counsel's performance did not fall below an objective standard of reasonableness and did not prejudice the defense—is not debatable by jurists of reason.

Third, Carty contends that trial counsel rendered ineffective assistance by failing to present additional evidence that would have rebutted the special issue of future dangerousness. Carty's cursory argument on this issue fails to address any of the district court's comprehensive discussion of trial counsel's tactics in countering future dangerousness. *Cf. Williams v. Cain*, 125 F.3d 269, 278–79 (5th Cir. 1997) (holding that the trial attorney's tactic of not presenting certain evidence was not prejudicial to the defendant because it avoided harmful crossexamination). The district court's thorough holding—that trial counsel's performance did not fall below an objective standard of reasonableness—is not debatable by jurists of reason.

Fourth, Carty asserts that trial counsel rendered ineffective assistance by failing to contradict the prosecution's evidence of the cause of Rodriquez's death, particularly as it relates to Carty's intent. The state habeas court denied Carty relief on this claim because, *inter alia*, trial counsel pursued a reasonable tactic of attacking the prosecution's expert and elicited beneficial testimony during cross-examination. The federal district court held that the state habeas court did not unreasonably apply federal law in denying Carty's claim. Carty now contends that had trial counsel pursued a different tactic, her defense would have been stronger.

This argument is insufficient to show that reasonable jurists could debate the district court's conclusion. *See Schaetzle*, 343 F.3d at 444.

Carty maintains that trial counsel provided ineffective assistance by permitting the dismissal of over 80% of potential jurors, by inappropriately questioning potential jurors, and by failing to object to prosecutor and court statements during jury voir dire. Carty fails to show that the exclusion of potential jurors, trial counsel's statements, or trial counsel's decisions not to object gave rise to constitutional violations. *See, e.g.*, *Penry v. Johnson*, 532 U.S. 782, 801–02 (2001) ("The comments of the court and counsel during voir dire were surely a distant and convoluted memory by the time the jurors began their deliberations on [the defendant's] sentence."); *Zafiro v. United States*, 506 U.S. 534, 540–41 (1993) ("[E]ven if there were some risk of prejudice, here it is of the type that can be cured with proper instructions, and 'juries are presumed to follow their instructions.'"); *Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998) ("Because failure to make a frivolous objection does not cause counsel's performance to fall below an objective level of reasonableness, [the defendant] has not established deficient performance."). Thus, the district court's holding—that trial counsel's performance did not fall below an objective standard of reasonableness—is not debatable by jurists of reason.

Sixth, Carty claims, as she did in state habeas court, that trial counsel rendered ineffective assistance by failing to advise her of her rights under the Vienna Convention on Consular Relations ("VCCR"), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. The district court held that whether Carty has an individually enforceable right under the VCCR is not clearly established for purposes of AEDPA; that Carty did not claim prejudice distinct from her unsuccessful claim of cumulative prejudice resulting from ineffective assistance of counsel; and that, in any case, Carty was not prejudiced because even when state officials notified her of VCCR-based rights, she failed to assert her foreign nationality. Carty is a citizen of St. Kitts and the United Kingdom. As such, Article 36 of the VCCR obligated the United States to notify the consular officers of St. Kitts and the United Kingdom of Carty's detention if she requested that they do so and also to inform her without delay of her notification rights. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 338–39 (2006). While the United States has undertaken that treaty obligation, the Supreme Court has not answered whether the VCCR creates rights enforceable by individuals. *See, e.g., Medellín v. Texas*, — U.S. —, 128 S. Ct. 1346, 1357 n.4 (2008). Filling that void, we have previously held that "'Article 36 of the Vienna Convention does not create an individually enforceable right.'" *See, e.g., Leal Garcia v. Quarterman*, — F.3d —, 2009 WL 1800141, at *2 n.19 (5th Cir. 2009) (quoting *Medellín v. Dretke*, 371 F.3d 270, 280 (5th Cir. 2004)). Carty nonetheless recites that "numerous other courts have held the opposite, that the Vienna Convention *does* create an individually enforceable right," *see id.* (citing, e.g., *Osagiede v. United States*, 543 F.3d 399, 409–10 (7th Cir. 2008), thus evidencing debate among jurists of reason. While there may be a vibrant debate in the courts of appeals about whether the VCCR conveys an individual right, that split does not mean that the state court judgment was "contrary to, or involved an unreasonable application of, *clearly established Federal law, as determined by the Supreme Court of the United States.*" *See* § 2254(d)(1) (emphasis added). There can be no debate among jurists of reason that the purported individual right is not at this time clearly established by

Supreme Court precedent. Yet, Carty continues to assert her VCCR claim by reference to various forms of purported ineffective assistance rendered by trial counsel, such as trial counsel's failure to make inquiries about her life on St. Kitts. Even assuming without deciding that trial counsel erred by failing to advise Carty of the availability of consular assistance, which may have resulted in such an inquiry, we conclude she has failed show that jurists of reason could debate that she has suffered any actionable prejudice resulting from trial counsel's deficient representation.[6] This is particularly true where she failed to assert her status as a foreign national after state officials notified her that foreign nationals would be permitted to contact their consuls under the VCCR. The district court's holding that the state habeas court's ruling was not contrary to clearly established federal law and the district court's conclusion that trial counsel's performance did not prejudice the defense are not debatable by jurists of reason.

Seventh, Carty asserts, as she did in state habeas court, that trial counsel should have objected when the prosecutor mentioned numerous baby items during his opening statement, items that the trial court later excluded from evidence, and also asserts that trial counsel should have sought instructions on and objected to evidence and argument relating to Anderson's, Caston's, and Combs's statuses as accomplice witnesses.

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[6] This conclusion is without prejudice to Carty's claim that trial counsel's alleged inadequate development of mitigation evidence constituted prejudicial deficient performance, an issue for which the district court granted a COA and that remains before us on appeal. To the extent Carty's VCCR claim is relevant to the development of facts supporting mitigation, we reserve judgment for our consideration of her pending appeal.

The baby items were not excluded at trial until after opening arguments, and numerous other baby items were admissible evidence; thus, trial counsel did not act unreasonably, and the purported error was only cumulative of existing evidence. In addition, because questions existed as to the alleged accomplices' statuses and the issue was thus submitted to the jury with proper instructions, trial counsel was not deficient in handling the accomplice witnesses. *See Blake v. State*, 971 S.W.2d 451, 455 (Tex. Crim. App. 1998) ("If the evidence is conflicting, it is proper to leave the question of whether an inculpatory witness is an accomplice witness as a matter of fact to the jury under instructions defining the term accomplice."). Thus, the district court's holding—that trial counsel's performance did not fall below an objective standard of reasonableness—is not debatable by jurists of reason, especially when viewed through AEDPA's multiple prisms.

Eighth, Carty argues that trial counsel should have resigned due to excessive workload and due to Carty's uncooperative interaction with trial counsel. The district court held that Carty has failed to raise an issue of constitutional magnitude, and that holding is not debatable by jurists of reason.

Carty's ninth and final ineffective assistance of counsel claim is that the cumulative errors of trial counsel deprived her of a fair trial. Carty preserved this claim in state habeas court. Most of the alleged errors that Carty recites did not constitute deficient performance and thus could not be the basis of a claim of cumulative prejudice. *See Miller v. Johnson*, 200 F.3d 274, 286 n.6 (5th Cir. 2000). Moreover, without prejudice to the merits of Carty's pending appeal, the ostensible errors that did occur did not "'so infect[] the entire trial that the resulting conviction violates due process.'" *Derden v. McNeel*, 978 F.2d 1453, 1454 (5th Cir. 1992) (en banc). Thus, jurists of reason could not debate the district court's holding denying Carty relief based on ineffective assistance due to the alleged cumulative errors of trial counsel.

Overall, we deny a COA for Carty's ineffective assistance of counsel claims.

2. Violation of VCCR-derived rights

Carty argues that the state erred by failing to inform her of her rights under the VCCR. As noted above, we have previously held that "'Article 36 of the Vienna Convention does not create an individually enforceable right.'" *See Leal Garcia*, 2009 WL 1800141, at *2 n.19 (quoting *Medellín*, 371 F.3d at 280). Thus, as Carty at this time lacks an individual right, she has failed to show that jurists of reason could debate the validity of her claim. *See, e.g.*, *Cardenas v. Dretke*, 405 F.3d 244, 253 (5th Cir. 2005) ("[The petitioner's] claim fails because this court has determined in the past that the Vienna Convention does not confer individually enforceable rights."). In any case, even presuming a debate about whether the VCCR gives rise to an individually enforceable right, *see Leal Garcia*, 2009 WL 1800141, at *2 n.19, we do not find that the merits of Carty's claim could be debated by jurists of reason because the state habeas court found that, as a matter of fact, Carty was twice notified of the availability of VCCR derived rights, and she denied that she was a foreign national on both occasions. Carty has not rebutted that conclusion with clear and convincing evidence. Because Carty has failed to show that jurists of reason would find it debatable whether her petition states a valid claim of the denial of a constitutional right based on the United States's obligations under the VCCR, we deny a COA.

3. Trial court errors

Carty asserts three errors by the trial court. Carty first argues that, during jury voir dire, the trial court improperly instructed the jury regarding capital murder by omitting reference to specific intent. *See* TEX. PENAL CODE § 19.03(a). Assuming that instruction was incorrect, "the question is . . . whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). In this case the ailing instruction did not infect the ensuing trial. The trial court properly instructed the jury regarding the requirement of intent immediately before submitting the case to the jury, the court also instructed the jury to resolve any doubt in favor of Carty when deciding between felony-murder and capital murder, and the parties argued at length about whether the prosecution had proven intent. *See Penry*, 532 U.S. at 801–02; *Zafiro*, 506 U.S. at 540. Jurists of reason could not debate that Carty has failed to show a due process violation.

Carty next argues that the trial court erroneously instructed the jury about criminal acts of violence, again during jury voir dire. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(b)(1). Carty has failed to show that the trial court's instruction was contrary to state law (even without reference to the oft-stated principle that state-law errors typically do not give rise to a right to relief in federal habeas proceedings) and has not shown that the purported error made the fundamental fairness of trial debatable. *See Little v. Johnson*, 162 F.3d 855, 862 (5th Cir. 1998) (holding that state law violations must play "a crucial, critical, and highly significant role in the trial" to warrant habeas relief). Jurists of reason could not debate that Carty has failed to show a due process violation.

Carty finally argues that Texas law unconstitutionally permits the jury to answer "no" to the special mitigation question without concluding beyond a reasonable doubt that the state had shown that the facts do not warrant otherwise. Carty exhausted this claim in state court, and it is foreclosed by our precedent. *See Ortiz v. Quarterman*, 504 F.3d 492, 504–505 (5th Cir. 2007) ("The Texas death penalty scheme does not violate [Supreme Court precedent] by failing to require the State to prove beyond a reasonable doubt the absence of mitigating circumstances." (citing *Scheanette v. Quarterman*, 482 F.3d 815, 828–29 (5th Cir. 2007)). Again, jurists of reason could not debate that Carty has failed to show a due process violation.

Because Carty has failed to show that jurists of reason would find it debatable whether her petition states a valid claim of court error resulting in a constitutionally deficient trial, we deny a COA.

4. Insufficient evidence of intent to kill

Carty argues, as she did to the state habeas court, that the evidence proving her intent to kill was legally insufficient. Texas law premises a murder conviction on whether the actor "intentionally or knowingly causes the death of an individual." TEX. PENAL CODE § 19.02(a)(1); *see Moreno v. Dretke*, 450 F.3d 158, 172 (5th Cir. 2006). Carty contends her statements—for example, that she wanted to cut the baby from Rodriguez's body—were insufficient to show intentional conduct because the baby was already born at the time of Rodriguez's murder, the scissors Carty intended to use were not capable of the abhorrent task, and she accomplished Rodriguez's murder by the alternative method of suffocation. Carty's statements did nothing more than evidence her willingness and desire to kill Rodriguez to accomplish the kidnaping of Rodriguez's baby, and the state offered sufficient evidence that, when viewed in the light most favorable to the it, *see Jackson v. Virginia*, 443 U.S. 307 (1979), proved that, as the state habeas found, "placing a person face down in the trunk, taping that person's hands, feet, and mouth, and then placing a plastic bag over that person's head . . . show[s] an intent to kill or cause serious bodily injury." Carty has failed to show that jurists of reason could debate whether the state habeas court reasonably applied federal law; we deny a COA.

5. Prosecutorial misconduct

Carty asserts two claims of prosecutorial misconduct. "Prosecutorial misconduct is not a ground for relief unless it casts serious doubt upon the correctness of the jury's verdict." *Styron v. Johnson*, 262 F.3d 438, 449 (5th Cir. 2001). Carty first asseverates that the prosecutor should have notified Corona of his right not to testify against Carty because she was his common-law wife. Carty has failed to show prosecutorial misconduct in putting Corona on the stand to testify. *See Benitez v. State*, 5 S.W.3d 915, 918–19 (Tex. App.—Amarillo 1999, pet. refused) ("[C]alling the spouse is not *ipso facto* error. [T]he State has no duty to prove that she testified voluntarily."). Nor has Carty shown the marital privilege is a constitutionally derived rule. *See Port v. Heard*, 764 F.2d 423, 430 (5th Cir. 1985) ("[T]he marital privilege has never been placed on a constitutional footing."). While it is debatable in fact whether Corona was Carty's common-law husband, reasonable jurists could not debate the absences of a constitutional violation by the prosecutors in putting Corona on the stand.

Carty next maintains that the prosecutors incorrectly argued that Anderson, Caston, and Combs were not accomplices because they were not present during the kidnaping and murder. *See Singletary v. State*, 509 S.W.2d 572, 575 (Tex. Crim. App. 1974). She also argues that the prosecutors misstated the law by asserting that corroboration required only evidence that the crime occurred. *See* TEX. CODE CRIM. PROC. ANN. art. 38.14.7.[7] For alleged misconduct based on the prosecutor's argument to the jury, an applicant is entitled to relief where "the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). The district court held that Carty did not object to the prosecutor's comments at trial, subjecting these errors to procedural default under Texas's contemporary objection rule. *See, e.g.*, *Barrientes v. Johnson*, 221 F.3d 741, 779 (5th Cir. 2000). Carty has offered no challenge to that conclusion, and it is not debatable by jurists of reason. The district court alternatively held that the instruction by the trial court provided the jury with adequate guidance to overcome any misstatement by the prosecutor and that any misstatement did not cast serious doubt upon the jury's verdict. *See, e.g.*, *Ward v. Whitley*, 21 F.3d 1355, 1366 (5th Cir. 1994) ("The arguments of counsel perforce do not have the same force as an instruction from the court."). Jurists of reason could not debate that no due process violation resulted from these purported errors.

Because Carty has failed to show that jurists of reason would find it debatable whether her petition states a valid claim of prosecutorial misconduct that casts doubt upon the correctness of the jury's verdict, we deny a COA.

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[7] Article 38.14 provides: "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense."

6. Cumulative error

Carty alleges cumulative error by the trial court, prosecutor, and trial counsel. "The cumulative error doctrine provides relief only when the constitutional errors committed in the state trial court so 'fatally infected the trial' that they violated the trial's 'fundamental fairness.'". *Spence v. Johnson*, 80 F.3d 989, 1000 (5th Cir. 1996) (citing *Derden*, 978 F.2d at 1457). To provide relief, cumulative errors must have "more likely than not caused a suspect verdict." *Id.* at 1001 (quotation marks omitted). In this case, without prejudice to the merits of Carty's pending appeal, and jurists of reason could not debate that the summation of otherwise non-prejudicial errors did not cause a suspect verdict or effect the fundamental fairness of the result. We deny a COA.

B. Procedural Default

Carty also seeks a COA on the district court's procedural default holdings. The district court concluded that Carty failed to exhaust numerous claims by improperly raising them in her Additional Further Response; that Texas courts would consider her unexhausted claims an abuse of writ if she filed them now, resulting in procedural default barring federal habeas review; and that exceptions to procedural default did not apply. *See Carty*, No. 06-614, slip op. at 53–55 (citing *Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997) ("A procedural default also occurs when a prisoner fails to exhaust available state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." (quotation marks and citation omitted))). The district court granted "a

COA on the question of whether [Carty] sufficiently exhausted state court remedies," but it did not specifically mention its corresponding procedural default rulings.

We initially note that the district court's underlying procedural default ruling was entirely dependent on its failure-to-exhaust ruling; thus, Carty's success on her appeal of the exhaustion issue would by definition remove the procedural default bar to federal review. Both parties addressed that issue in their main briefs, and we do not rule on it here. Presently, Carty asks us to grant a COA on the additional, alternative basis that jurists of reason could debate the district court's conclusion that exceptions to procedural default did not apply. Although the interplay of these various procedural rulings and exceptions raises some interesting legal questions, *see O'Sullivan v. Boerckel*, 526 U.S. 838, 851–857 (1999) (Stevens, J., dissenting), we need not here delve into those nuances, as a COA is not warranted in any case.

Carty initially claims that it is debatable whether Texas state courts would apply an equitable exception to procedural default. *See Ex parte Hood*, Nos. WR-41, 168-10, AP-75,370, 2008 WL 4151666, at *2 (Tex. Crim. App. Sept. 9, 2008). In *Ex parte Hood*, the Court of Criminal Appeals opted to reconsider a prior dismissal of a subsequent application for a writ of habeas corpus based on "developments in the law regarding nullification instructions." *Id.*;[8] *see also Ex Parte Hathorn*,— S.W.3d —, 2009 WL 929095 (Tex. Crim. App. 2009) (same); *Ex*

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[8] *Ex parte Hood* and its progeny considered the atypically complex development of Supreme Court precedent in *Smith v. Texas*, 550 U.S. 297 (2007); *Brewer v. Quarterman*, 550 U.S. 286 (2007); *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Penry v. Johnson*, 532 U.S. 782 (2001); and *Penry v. Lynaugh*, 492 U.S. 302 (1989).

parte Briseno, No. AP-76132, 2009 WL 949075 (Tex. Crim. App. Apr. 8, 2009) (ordering briefing on same). In this case, Carty alleges neither legal nor factual post-application developments similar to those that existed in *Ex parte Hood* and its progeny; thus, she has failed to show that the district court's procedural default ruling is debatable by jurists of reason based on these cases.

Carty next argues that the government waived the issue of procedural default. *See Fisher v. Texas*, 169 F.3d 295, 301 (5th Cir. 1999) ("A state waives a procedural bar defense by failing to raise the defense in the district court."). While exhaustion and procedural default are two distinct concepts, in cases where procedural default is based on the failure to exhaust, waiver of exhaustion waives both. *See Bledsue v. Johnson*, 188 F.3d 250, 254 (5th Cir. 1999) ("[T]he state has waived any independent exhaustion argument, as well as the exhaustion argument included within the doctrine of procedural default."). To the extent that the government's waiver of procedural default is dependent on its purported waiver of exhaustion, both parties have briefed that issue in their main briefs, and we will consider the issue in our review of Carty's appeal. Otherwise, it is undisputed that, after prompting by the district court, the government asserted procedural default and Carty received notice and had an opportunity to respond. *See Magouirk v. Phillips*, 144 F.3d 348, 359 (5th Cir. 1998).[9] Thus, jurists of reason could not debate that the state did not waive its procedural default defense.

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[9] As such, we need not address Carty's argument that the state can waive a procedural default that is exclusively dependent on the exhaustion requirement by a means other than counsel's express statement. *Cf. Jackson v. Johnson*, 194 F.3d 641, 652 & n.35 (5th Cir. 1999) ("Although a 'State shall not be deemed to have waived the exhaustion requirement . . . unless the State, through counsel, expressly waives the requirement,' 28 U.S.C. § 2254(b)(3), the

Carty additionally claims that she had shown cause and actual prejudice to excuse her procedural default because the state habeas court and state habeas counsel agreed to an extended period for filing her claims, a period that the state habeas court then did not honor. *See generally Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (recognizing the cause and actual prejudice exception). The district court held that this claim, at its base, was one for ineffective assistance of habeas counsel. Because Carty showed no reason why appointed counsel did not file the claims in her initial application for post-conviction relief, the court concluded that cause did not apply. *See Ries v. Quarterman*, 522 F.3d 517, 526 n.5 (5th Cir. 2008) ("[I]neffective assistance of state habeas counsel cannot provide cause to excuse a procedural default."). Carty has provided no basis on which a jurist of reason could debate the district court's conclusion.

Carty finally claims that a fundamental miscarriage of justice will result if her claims are procedurally defaulted because of her "actual innocence of the death penalty." Carty asserts that a fundamental miscarriage of justice occurred in the punishment phase of trial, but only in sufficient depth regarding trial counsel's assistance in presenting mitigating evidence. *See Lookingbill v. Cockrell*, 293 F.3d 256, 263 (5th Cir. 2002) ("Where a habeas petitioner fails to brief an argument adequately, we consider it waived."). Mitigation evidence cannot be the basis of a claim of a fundamental miscarriage of justice. *See Sawyer v. Whitley*, 505 U.S. 333, 347 (1992)

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exhaustion requirement is related but distinct from that of procedural default.")

("[T]he 'actual innocence' requirement must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error."). Carty has again provided no basis on which a jurist of reason could debate the district court's conclusion.

Because jurists of reason could not debate the district court's procedural rulings, we deny Carty's request for a COA on the applicability of exceptions to procedural default.

IV. CONCLUSION

For the above-described reasons, Carty's motion for an additional COA is DENIED. Her request for oral argument on the claims for which the district court issued a COA is GRANTED, and we reserve opinion on those claims until after oral argument.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this order should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX C

ENTERED October 27, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-70049

LINDA ANITA CARTY,
Petitioner-Appellant,

v.

RICK THALER, DIRECTOR,
TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent – Appellee.

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING

Before: KING, DENNIS and OWEN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:
/s/ Carolyn Dineen King
United States Circuit Judge

APPENDIX D

ENTERED October 1, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 06-614

LINDA ANITA CARTY,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

ORDER

Linda Anita Carty ("Petitioner") a Texas inmate, seeks federal habeas corpus relief. A jury convicted Petitioner of capital murder for kidnapping and killing Joana Rodriguez. After a separate punishment phase, the jury answered Texas' special issue questions in a manner requiring the imposition of a death sentence. This action comes before the Court on Nathaniel Quarterman's ("Respondent") renewed motion for summary judgment. (Docket Entry No. 28). After reviewing the pleadings, the record, and the applicable law, the Court enters the following findings:

FACTUAL BACKGROUND

This case has a long and complex factual background. In this federal habeas petition, Petitioner essentially alleges that her conviction and sentence resulted from lapses in her legal representation, and the failure of her trial attorneys and the prosecution to safeguard her constitutional rights. Petitioner does not raise a claim of actual innocence, but her pleadings imply that she played no part in kidnapping or killing the victim. Before turning to the issues Petitioner raises on federal habeas review, this Court will summarize the extensive state and federal proceedings including background information on crime, the police investigation that led to Petitioner's arrest, and the trial testimony that resulted in a finding of guilt. The Court will then discuss the testimony that the jury considered in answering Texas' special issues.

I. The Crime

On Saturday May 12, 2001, Raymundo Cabrera and Joana Rodriguez became the parents of a baby boy named Ray. The next evening, which was Mother's Day, they took their baby home for the first time. Cabrera and Rodriguez lived in apartment number 36 of the Shady Glen apartments in Harris County, Texas.

Cabrera's cousin, Rigoberto Cardenas, shared the two-story apartment with them. Cabrera had taken time off from his construction job to be with his new son. He planned on returning to work on Wednesday, May 16, 2001.

At approximately 1:00 a.m. on May 16, 2001, men carrying guns broke down the door of the apartment. Someone grabbed Cardenas who was sleeping on the floor while others went directly to the bedroom upstairs. The gunmen demanded drugs and money from Cardenas. Cardenas told the men to take $80 out of his wallet. The men seemed unhappy with the amount of cash and kept asking for drugs and money. One of the gunmen struck Cardenas in the head with a pistol. The gunmen yanked a phone cord from the wall and tied Cardenas' hands and feet. The gunmen searched the apartment but did not find any drugs.

While the men were in the house, Cardenas heard a cell phone ring. One of the men answered it and said: "We are here inside" and "Do you want it?" Statement of Facts Vol. 20 at 6061 (cited hereinafter as "Tr. Vol. at _"). The man on the phone then yelled: "She's outside, we got to go." Tr. Vol. 20 at 61. The men put a couch over the bound Cardenas. Cardenas heard someone go upstairs, some people come down the stairs, and baby Ray crying.

Cabrera testified at trial that he was awakened by a loud noise. Two men with guns then burst into the bedroom. The men demanded money. Cabrera had saved $1000 to purchase a car for his family. Cabrera told the men where he kept his money and asked them to take it. The gunmen took all the cash. Unhappy that there was not more money, the gunmen became more aggressive and began binding Cabrera's head with duct tape. As the men covered his nose and mouth with tape, Cabrera struggled for air, and tore a breathing hole in the tape.

The men began striking Cabrera with their pistols. After beating him, the men bound Cabrera's hands and feet with duct tape, leaving him hogtied face-down on the bed. Cabrera heard one man say: "We are going to take the baby and the mother," and then tell his wife: "Take your baby and let's go." Tr. Vol. 20 at 39. Cabrera heard his wife get off the bed and leave.

Cardenas freed himself and then cut Cabrera loose from the duct tape. Both Rodriguez and baby Ray were no longer in the apartment. Cardenas and Cabrera ran to a neighbor's apartment and called the police.

II. The Investigation

Police officers responded to the call of a home invasion. An initial canvas of the apartment complex returned no useful information. When interviewing Cardenas and Cabrera, the police were struck with a key difference between the episode at the apartment and other home invasions: the purpose of the robbery did not seem to be acquisition of drugs or large quantities of money. The crime focused on facilitating an abduction. The police suspected that the gunmen kidnapped Joana and baby Ray for money and waited for a ransom demand.

Later that day, a resident of apartment number 40, Florencia Meyers, related to the police a suspicious conversation that she had with Petitioner on the day before the kidnapping. Petitioner rented apartment 38 of the same complex, which was across the sidewalk from where baby Ray was abducted, though she had recently moved out her belongings. Petitioner had been living with Jose Corona, who the record refers to as both her boyfriend and as her husband. Meyers told the police that on May 15 Petitioner was sitting in the parking lot of the apartment complex in the driver's seat of a rental car. Petitioner waived Meyers over and asked her to sit down.

Meyers noticed that Petitioner had a baby carrier in the car. Tr. Vol. 20 at 154. Petitioner first asked if Meyers had seen Corona. When Meyers responded that she had not, Petitioner told her that she "was going to be having the baby tomorrow." Tr. Vol. 20 at 151. Meyers "knew she wasn't pregnant," and asked what she meant. Tr. Vol. 20 at 151-52. Petitioner then "used her two hands and she touched her stomach, gesturing that she was pregnant." Tr. Vol. 20 at 152. Petitioner, who had previously discussed relationship problems with Meyers, told her "that's why she's very upset over [Corona's] attitude because [Corona] knew that this baby was coming and he just kept acting – not acting right . . . . [He] drinks a lot and it made her upset." Tr. Vol. 20 at 152-53. Throughout the conversation Petitioner kept patting her stomach to show that she was pregnant. Petitioner told Meyers that "she was going to have the baby tomorrow and she was going to – when she had the baby, she was going to bring the baby over to show [Meyers]." Tr. Vol. 20 at 155. "[T]he whole thing sounded strange" to Meyers. Tr. Vol. 20 at 155.

After speaking with Meyers, the police ran a check on Petitioner's name and found that she made a police report on May 13, 2001. Tr. Vol. 4 at 14. Petitioner claimed that she had been assaulted by Hispanic males in her apartment complex. Tr. Vol. 4 at 15. The police contacted Petitioner and "asked if she would return to her former residence because [they] were trying to show her some pictures of individuals who might have assaulted her[.]" Tr. Vol. 4 at 17. The police, however, did not intend to question Petitioner about the assault; they wanted to know if she had information about the kidnapping. Tr. Vol. 4 at 20, 41; Vol. 20 at 108. Petitioner initially agreed to meet the police at the Shady Glen Apartments, but they later met at a McDonald's parking lot because the police were concerned that the "media circus" at the apartment complex would endanger their investigation. Tr. Vol. 4 at 26-27, 38. Petitioner arrived at the parking lot at around 4:20 p.m.

The police told Petitioner they wanted to interview her about the kidnapping. Tr. Vol. 4 at 29. Petitioner said that she saw news accounts of the crime. Tr. Vol. 20 at 110; Vol. 4 at 29. Petitioner agreed to meet the police back at the Shady Glen apartment complex. Tr. Vol. 4 at 30-31. When they reached the apartments, police officers told Petitioner that they had information that she "wanted a baby." Tr. Vol. 4 at 32. Petitioner then gave permission to search her apartment. Tr. Vol. 4 at 32-33. After finding nothing incriminating in her apartment, the police asked Petitioner to accompany them to the station. Tr. Vol. 4 at 33. Petitioner said that she would after she spoke to Corona. Tr. Vol. 4 at 33. Petitioner rode in the police car to the station.

Petitioner told the police she was a "snitch" for the DEA. Tr. Vol. 4 at 34-35. For a short period several years before, the Houston Police Department and the Drug Enforcement Agency used Petitioner as a confidential informant after she had been accused of auto theft and impersonating a federal agent. She was taken "off the books" when she was arrested during a drug sting. Although she often described herself as a confidential informant, Petitioner was not an authorized government agent. Petitioner had occasionally contacted DEA agent Charlie Mathis with information, but she had not provided anything useful in some time. Petitioner had repeatedly told Mathis that she was pregnant, and even told him that she had given birth to a baby, but Mathis disbelieved her. Mathis at times "felt that maybe she wasn't as truthful as she should have been[.]" Tr. Vol. 21 at 119. Mathis was surprised in 2000 when Petitioner told him she was pregnant because he "didn't even know that she was married or . . . was thinking about continuing a family." Tr. Vol. 21 at 103. In 2001, she told Mathis that she had given birth to a baby boy, but Mathis was confused because Petitioner said the boy was older than he would have been had he been born in 2000. Tr. Vol. 21 at 102-03. In January 2001, Petitioner told Mathis she was pregnant again, but was having problems in her relationship with Corona. In a conversation with Petitioner and Corona, Mathis told Corona that, "with her being pregnant and about to give birth, that it would be kind of ridiculous for them to even consider a breakup at that point." Tr. Vol. 21 at 104. Mathis testified that when he mentioned the pregnancy Corona "started laughing. I mean, it was like, you know, what baby? You know, what are you talking about? You know, he seemed very confused, and it confused me because I was wondering, you know, what was going on." Tr. Vol. 21 at 1051.

On May 16, 2001, Petitioner called Mathis and asked him to come to the police station. Tr. Vol. 4 at 52-53, 67. The police also called Mathis and asked him to help interview Petitioner. Tr. Vol. 4 at 46. When Mathis arrived, Petitioner told the police that she wanted to speak with him alone. Tr. Vol. 4 at 77-78. Mathis repeatedly told Petitioner she was in "big trouble" and encouraged her to tell the police everything. Tr. Vol. 4 at 78-79. Mathis urged Petitioner to divulge any information she had about the location of Rodriguez and baby Ray. Tr. Vol. 21 at 114. Petitioner told Mathis that "she had given [two] cars to someone and that she may have made a mistake because she felt that these people were involved in the kidnapping of the woman and the baby and that she knew where these people would be at." Tr. Vol. 21 at 110. Petitioner told the police that she possibly could lead them to the victim and her child. Tr. Vol. 4 at 85.

Petitioner took the police to 6042 Van Zandt Street in Houston. Van Zandt Street was "a well-known place for selling dope[.]" Tr. Vol. 22 at 63. Approximately twelve police officers went to the Van Zandt address. When the police arrived, they found a man standing beside a running black Chevrolet Cavalier that belonged to Petitioner's daughter. The police officers ordered the man to the ground. Inside the vehicle they found baby Ray alive and wrapped in a blanket. Tr. Vol. 21 at 125-27. An ambulance took baby Ray, who was in good condition, to the hospital. Inside the black Chevrolet, the police recovered numerous items used to take care of a baby, such as a diaper bag, a diaper changing pad, a pacifier, several baby bottles, baby formula, baby clothing, a car-seat carrier, a baby stroller, and baby bath items. Tr. Vol. 21 at 176-78. A live .38-caliber round was in the baby bag. Tr. Vol. 21 at 183.

The police also found a rental car at the Van Zandt location. When the police opened the car door, they could smell "an odor of a dead and decaying body." Tr. Vol. 21 at 142. The police found Rodriguez's corpse in the trunk. Her body was in the fetal position, with duct tape around her hands and feet. A plastic bag was secured around her head. The police then arrested Petitioner and several other individuals at the Van Zandt Street address.

Subsequent police investigation confirmed that Petitioner planned and orchestrated the kidnapping and murder of Rodriguez because she wanted a baby. In the days before the murder, Petitioner repeatedly told people that she was pregnant and going to deliver a baby boy. At the same time, she gathered around her a group of individuals who would help her kidnap a newborn. Trial testimony created an incriminating timeline showing how Petitioner's story about being pregnant coincided with the kidnapping of baby Ray. This timeline culminated in the murder of Joana Rodriguez. Because the timeline of events is relevant to the finding of guilt in this case, the Court will outline that timeline below.

III. Timeline of Events

Early May 2001

Corona and Petitioner had lived together for two-and-a-half years before May 2001, but Corona moved out weeks before the murder. Tr. Vol. 20 at 190. Petitioner had engaged in a pattern of telling Corona she was pregnant, and then would never actually give birth. Petitioner would never let Corona go with her to the doctor, would not appear pregnant, and then would later tell Corona that "she had lost it." Tr. Vol. 20 at 192-93, 200-01. Corona ceased believing Petitioner when she said she was pregnant. Tr. Vol. 20 at 202. Petitioner and Corona argued "a little" about the supposed pregnancies. Tr. Vol. 20 at 201.

Corona left Petitioner the beginning of May 2001 because he "was tired of lies" including about the supposed pregnancies. Tr. Vol. 20 at 205. When Corona decided to leave, Petitioner again claimed that she was pregnant and begged him to stay until the birth. Tr. Vol. 20 at 206-07. Corona told her that he did not believe that she was pregnant, said that he was moving out of the apartment, and said that he did not love her. Tr. Vol. 20 at 205-06. Petitioner's daughter Jovelle Carty rented a Pontiac Sunfire for her mother's use as she moved from the Shady Glen Apartments. Tr. Vol. 24 at 42-46.

Wednesday May 9, 2001

Petitioner visited a storage rental business where she leased two units. Petitioner told Sherry Bancroft, the manager of a storage unit business, that she was going to have a baby. Petitioner said that "she and her fiancé was having a lot of problems . . . that she was going to have to have another storage [unit] to put her stuff in and that she was pregnant." Tr. Vol. 21 at 43.

Saturday May 12, 2001

Petitioner again drove the rental car to the storage units. She told Bancroft that "she was expecting, that she was going to have the baby that day, that afternoon, and that she was going to have a boy." Tr. Vol. 21 at 44. Petitioner told Bancroft that she "was in labor, that she had been having some pains." Tr. Vol. 21 at 45. Bancroft observed that Petitioner did not seem to be in any pain. Tr. Vol. 21 at 45. Because of their relationship problems, though, Petitioner said "that she was trying to figure out whether she was going to let [Corona] be a part of the baby's life or not." Tr. Vol. 21 at 51. Petitioner rented a third storage unit that day. Tr. Vol. 21 at 45-46.

Petitioner's daughter traveled to Florida to visit relatives. Petitioner's daughter left her black Chevrolet Cavalier at her grandmother's house.

Petitioner visited a medical supply store and purchased a stethoscope, nurse's scrubs, and "a stainless steel pair of scissors." Tr. Vol. 23 at 181.

Sunday May 13, 2001

Starting on Mother's Day, Petitioner began recruiting a group of people who would help her abduct a baby. Petitioner began by calling her friend Josie Anderson whom she had known since 1997. Petitioner had helped Josie Anderson out financially in the past. Tr. Vol. 22 at 200-01. At around 9:00 a.m., Petitioner came to Josie Anderson's apartment driving the rental car. Tr. Vol. 21 at 204. Petitioner drove Josie Anderson to the store. Josie Anderson noticed a baby car seat, a diaper bag with items commonly used with babies, and the things Petitioner purchased from the medical supply store in the car. Tr. Vol. 21 at 212-14. Petitioner had previously told Josie Anderson that she was pregnant, but she never had delivered a baby. Tr. Vol. 22 at 18-19. Josie Anderson overheard Petitioner tell someone on her cell phone that she was pregnant and going to have a baby soon. Tr. Vol. 22 at 18-19.

Petitioner told Josie Anderson that she had a "lick" – "a robbery, where you kick the door in" – planned. Tr. Vol. 21 at 206-07. Petitioner told Josie Anderson that she knew some people that had 200 pounds of marijuana and some cocaine in their apartment. Tr. Vol. 21 at 207. Petitioner said that the "lick" would target a "pregnant lady . . . and her husband." Tr. Vol. 21 at 207-08. Josie Anderson was interested in participating in the "lick." Tr. Vol. 21 at 208. Petitioner asked Josie Anderson if she knew anyone else who would like to help. Tr. Vol. 21 at 209. Shortly afterwards, they encountered Josie Anderson's boyfriend, Christopher Robinson, and his friend Marvin "Junebug" Caston.

Robinson and Caston got into the car after putting a baby carseat in the trunk. Tr. Vol. 21 at 212. Josie Anderson and Petitioner recruited Robinson and Caston to participate in the robbery. Tr. Vol. 22 at 60, 143-44. Petitioner described the planned robbery. Petitioner outlined a home invasion in an apartment which allegedly contained large quantities of marijuana and cash. Robinson understood that they would get more than 500 pounds of marijuana. Tr. Vol. 22 at 143. Caston understood that there would be 1000 pounds of marijuana involved. Tr. Vol. 22 at 61. Petitioner told the others that she would pay them if there were no drugs in the apartment. Tr. Vol. 22 at 61-62.

Petitioner drove Josie Anderson, Caston, and Robinson to the Shady Glen Apartments so that they could scope out the apartment. Petitioner took the group into her apartment, which had the same layout as the one where they intended to do the "lick," so that they could familiarize themselves with the floor plan.

While at the apartment complex, Petitioner told the group that "the pregnant lady was supposed to have slept with her husband and that [it] was supposed to have been her husband's baby." Tr. Vol. 21 at 221-22, Tr. Vol. 22 at 160-61. Petitioner said that she "wanted that baby from the bitch." Tr. Vol. 21 at 222. Petitioner said "I want it. I'm going to get the baby. I'm going to take it away . . . from them." Tr. Vol. 21 at 222; Vol. 22 at 62. Petitioner told Josie Anderson that "she needed the baby, needed a baby, needed a baby, needed their baby, that she needed the lady's baby." Tr. Vol. 22 at 21. When the group asked what she meant, Petitioner said "I'm going to cut the baby out of the lady and take the baby." Tr. Vol. 21 at 222; Vol. 22 at 63-64, 161-62.

Caston opined that Petitioner "wanted to cut the baby out, because she is not knowing that the baby was already born." Tr. Vol. 22 at 63. Josie Anderson "was thinking, man, this bitch is crazy." Tr. Vol. 21 at 222. The group understood that their participation in the "lick" did not involve doing anything to the woman, but that Petitioner was the one who "was going to take the baby from the lady." Tr. Vol. 21 at 223, 229; Vol. 22 at 64. The group planned to meet later and then separated. Petitioner and Josie Anderson went to get ski masks and duct tape for the "lick." Tr. Vol. 22 at 148.

At around 11:00 a.m., Petitioner called 9-1-1. Tr. Vol. 20 at 64. Petitioner apparently claimed that a group of Hispanic males approached her at the Shady Glen apartments, pulled a gun on her, and then ran away. Tr. Vol. 20 at 106.

That evening, Cabrera and Rodriguez brought baby Ray home for the first time.

Late Sunday evening or early Monday morning, Petitioner and the group met to prepare for the "lick." Petitioner picked up Josie Anderson and Caston. Everyone but Petitioner was smoking marijuana. Tr. Vol. 22 at 116. They traveled to the house on Van Zandt Street to pick up Robinson. When they arrived, Petitioner explained the proposed crime to Robinson's half-brother Zebediah Combs, who was on electronic monitoring and could not leave the Van Zandt Street address: "[S]he had a job or something for them to do, and she was trying to recruit some people. . . . [I]t was a drug deal. . . . [F]or the drug deal she wanted a favor in return: and the favor was to bring the lady to her." Tr. Vol. 23 at 55-56. "[P]art of the payment was showing [them] where the marijuana was, and she said she was going to pay them when they brought the lady to her." Tr. Vol. 23 at 59. Petitioner explained that she wanted them to do the kidnapping because "her husband had got the lady pregnant." Tr. Vol. 23 at 56, 69. Once the others brought the pregnant woman to her, she was "going to handle it from there." Tr. Vol. 23 at 60.

The group decided that Josie Anderson, Robinson, and Caston would take any drugs they found "but the kidnapping part, [they] were going to leave her with her [Petitioner]." Tr. Vol. 21 at 229-30. The men planned to enter the apartment first, subdue the occupants, and find the drugs. Petitioner and Josie Anderson would enter later to "grab the lady." Tr. Vol. 22 at 159. Petitioner wanted the men "to kill everyone in the house except the lady," but the men refused. Tr. Vol. 22 at 159-61. They traveled to the Shady Glen Apartments.

At the Shady Glen Apartments, two unidentified men joined the group. All but Josie Anderson went into Petitioner's apartment. Josie Anderson, who was to be the lookout, went around the complex to see if they could do the "lick" unobserved. Tr. Vol. 21 at 231. Petitioner "got shook" and did not want to do the "lick" because there were "too many people with their lights on," Tr. Vol. 21 at 236, and "people [were] outside," Tr. Vol. 22 at 75. The group left without committing the robbery.

At that point, Caston began to be concerned that the "lick is not right" and that it was a "bogus" lick. Tr. Vol. 22 at 73-74. Robinson worried that Petitioner was "acting funny." Tr. Vol. 22 at 165. Josie Anderson began saying "[t]hat it ain't right, that [Petitioner] was lying about some things." Tr. Vol. 22 at 75.

Monday May 14, 2001

Petitioner ran into Josie Anderson at around 9:00 a.m. on Monday morning. Petitioner said that she was looking for Caston to find out if they still wanted to participate in the "lick." Tr. Vol. 22 at 14-15. Petitioner and Anderson went to Caston's house, but Caston's mother told them he was asleep. Tr. Vol. 22 at 17. Petitioner took Josie Anderson home. Josie Anderson did not participate in the home invasion or kidnapping. Tr. Vol. 22 at 23-24. When she heard about the kidnapping on the news, she said "[t]hat bitch did that shit for real." Tr. Vol. 22 at 25.

At some point on May 14 or 15, Petitioner called Mathis and told him that she was going to have a baby boy. Tr. Vol. 21 at 106-07.

Later that afternoon, Petitioner picked up Caston. Tr. Vol. 22 at 79-80. Petitioner was then "really, really talking about the baby thing." Tr. Vol. 22 at 79. She said that "[s]he was telling her husband that she was pregnant." Tr. Vol. 22 at 79-80. Petitioner told Caston "she just wanted that specific baby because she was saying that her husband was having an affair with the woman." Tr. Vol. 22 at 80. Petitioner rented a hotel room because she had moved out of her apartment. Petitioner took Caston out to eat and then they went to the hotel. Caston carried a baby bag into the room for Petitioner. Tr. Vol. 22 at 80, 82. Trial counsel successfully moved to suppress items the police later found while searching the hotel room, including many items used to take care of a baby. Petitioner left Caston alone in the room for around half an hour. When Petitioner returned, she took him to buy some marijuana and then drove him back to his mother's house. Tr. Vol. 22 at 81-83.

Tuesday May 15, 2001

On May 15, Petitioner called Corona "many times" to tell him that she was going to have a baby boy the next day. Tr. Vol. 20 at 209.

Petitioner and Josie Anderson went to Caston's house two or three times looking for him. Caston asked his mother to tell Petitioner that he was not home. Tr. Vol. 22 at 85. Caston did not participate in the "lick."

Petitioner also went to the Van Zandt Street house looking for Robinson. Because Robinson was not there, she spoke with Combs. Petitioner asked Combs about his leg monitor, and when he told her about his case, "she was telling [him] . . . how to go about beating [his] case . . . . She say she had knew a couple lawyers, you know. She had went to law school." Tr. Vol. 23 at 67. Petitioner again told Combs that her boyfriend/husband had an affair with Rodriguez and that Rodriguez was pregnant with his child. Tr. Vol. 23 at 69. When Robinson did not arrive by 4:00 p.m., Petitioner left.

Between 6:00 and 7:00 p.m., Meyers saw Petitioner in the rental car at the Shady Glen Apartments. Petitioner told Meyers she was pregnant and would be having the baby the next day. Tr. Vol. 20 at 151-52. Petitioner told Meyers that she would bring the baby over to show her. Tr. Vol. 20 at 155.

Petitioner went to her storage units after 6:30 p.m. Petitioner sought Bancroft's help because she could not get into one of the units she rented. Petitioner seemed to be in "a real hurry, a rush" and a "panic." Tr. Vol. 20 at 50. Bancroft asked about the baby. Petitioner told her that "the baby was doing fine and that he was home with the father[.]" Tr. Vol. 20 at 50. Petitioner took a blanket and two baby outfits out of the storage unit. Tr. Vol. 20 at 51.

Petitioner returned to the Van Zandt Street house between 8:00 and 9:00 p.m. Petitioner spoke with Robinson, his friend Carliss "Twin" Williams, and Josie's cousin Gerald "Baby G" Anderson. All agreed to participate in the "lick." Tr. Vol. 22 at 173-74; Vol. 23 at 76-77. At this point, the plan changed slightly. Petitioner would not enter the apartment; the gunmen were to "get this pregnant lady out of the house." Tr. Vol. 22 at 175. Not all the participants wanted to assist in the intended kidnapping. Robinson and Williams decided to "get the money and the drugs [and] leave" Petitioner "and don't worry about all that [Petitioner] is talking about, killing and snatching the lady and all that." Tr. Vol. 22 at 176, 179.

Wednesday May 16, 2001

After midnight, Petitioner, Robinson, Williams, and Gerald Anderson left the Van Zandt Street address. Petitioner went alone in her car as "a look-out" to "peep at everything . . . look at the scene . . . see if there was anybody outside." Tr. Vol. 22 at 178. When the gunmen reached the apartment, Petitioner's car was in the parking lot. Petitioner called Gerald Anderson's cell phone and told him to start the "lick." Tr. Vol. 22 at 181. Phone records confirmed that Petitioner called Gerald Anderson's cell phone at 12:50 a.m. Robinson and Williams kicked in the apartment door and then rushed upstairs. The men assaulted Cabrera. Robinson first hit Cabrera with his pistol when Cabrera said he had no more money. Tr. Vol. 20 at 37; Vol. 22 at 190-91. Williams taped Cabrera's hands and feet together.

Robinson went downstairs and found Gerald Anderson taping up Cardenas. Tr. Vol. 20 at 54, Vol. 22 at 193. Robinson searched the downstairs for drugs and money. Robinson hogtied Cardenas.

Gerald Anderson's phone rang. Gerald Anderson said that Petitioner was coming into the apartment. Tr. Vol. 22 at 200. Phone records proved that Petitioner called Gerald Anderson at 1:10 a.m. When Petitioner entered the apartment, Robinson lied and told her that they had killed the men. Tr. Vol. 22 at 201-02. Robinson lied "[b]ecause [Petitioner] was talking about murder and kidnapping, and that wasn't what [the men] went there for. That wasn't a part of [their] plan." Tr. Vol. 22 at 201. Robinson then left the apartment.

Williams and Gerald Anderson went upstairs. Tr. Vol. 22 at 201-02. A few minutes later, Robinson saw Petitioner leave the apartment with baby Ray. Tr. Vol. 22 at 202-04. At that point, Robinson, "put it together that when [Petitioner] was talking about the lady was pregnant, she knew the lady had the baby all the time." Tr. Vol. 22 at 204. Williams and Gerald Anderson brought Rodriguez out of the apartment and put her in the trunk of Robinson's car.

The kidnappers left the apartment complex in two cars and met at a storage lot. Petitioner got out of her car carrying baby Ray. Robinson complained that they had deviated from the plan by kidnapping the victim. Williams suggested that they seek a ransom for Rodriguez. Tr. Vol. 22 at 210. At her direction, the men put Rodriguez in the trunk of Petitioner's car. Tr. Vol. 22 at 210. The two cars took separate paths back to the Van Zandt address.

When they arrived at the Van Zandt address, Petitioner was standing by the car holding baby Ray. Petitioner told the men to tie up Rodriguez. Tr. Vol. 22 at 216, 221. The men talked about freeing Rodriguez, but Petitioner told them that they could not because she had seen their faces. Tr. Vol. 22 at 217. Robinson and Gerald Anderson both refused to tape up the victim. Williams opened the trunk and taped her mouth and hands. Tr. Vol. 22 at 223-24. At trial, Robinson described how Williams bound the victim:

> The State: So when that trunk opens up, does [the victim] scream?
>
> Robinson: No.
>
> The State: Does she yell?
>
> Robinson: No.
>
> The State: Does she cry?
>
> Robinson: I think she was — well, she was crying.
>
> The State: Was she sobbing? Could you hear her?
>
> Robinson: Yes, sir.
>
> The State: What was she saying?

Robinson: She really didn't say too much.

The State: Well, if she said something, what did she say?

Robinson: She said something about — she said it in Spanish. I don't speak Spanish.

The State: You have no idea what she said, but she did speak?

Robinson: Yes, sir.

The State: She was crying?

Robinson: Yes, sir.

The State: And [Petitioner] is standing right there holding the baby in front of her, right?

Robinson: Yes, sir.

The State: Can you see the lady, from where you're standing, inside the trunk . .. did you see her?

Robinson: I can see her.

The State: Is she looking out — you say she is crying, she is saying something in Spanish, she is looking out of the trunk, right?

Robinson: Yes.

The State: She is looking at all of you, isn't she?

Robinson: She is mostly looking at [Petitioner].

The State: Why?

Robinson: She had her baby.

The State: She is looking and she is saying something to [Petitioner] or to the baby. Can you tell who she is speaking to?

Robinson: I don't know what she was saying, but she was really mostly talking to [Petitioner].

The State: So [Williams] starts to tape the lady.

Robinson: Yes.

The State: She is crying. What part does he tape first?

Robinson: The mouth.

The State: The mouth. Does she stop crying when the tape goes over the mouth?

Robinson: She stopped

The State: Making sounds, didn't she?

Robinson: Yes, sir.

The State: Could you see the tears in her eyes still?

Robinson: I really wasn't that close to see the tears in her eyes.

Tr. Vol. 22 at 221-23. Williams finished taping Rodriguez and then closed the trunk.

Then, the "argument started." Tr. Vol. 22 at 225. The men were mad at Petitioner because she "just played" them. Tr. Vol. 22 at 215. The gunmen argued with Petitioner because she had taken them on a "bogus lick." Tr. Vol. 22 at 215-16, 225; Vol. 23 at 81. The men considered killing Petitioner. Tr. Vol. 22 at 227-29. Petitioner was trying to calm the group down by telling them "she was going to pay them and she didn't have no money for them so she said she had another lick for them the next day." Tr. Vol. 23 at 82. Robinson told the group to quiet down because his grandmother was sleeping.

Combs then came outside. Petitioner excitedly told him, "I got my baby. I got my baby." Tr. Vol. 23 at 80. One of the men opened the trunk and showed Combs the victim. Combs argued with Petitioner about what to do with the victim and told Petitioner to leave. Petitioner "said she couldn't drive the car with – drive away with the lady in the trunk like that. She couldn't leave like that." Tr. Vol. 23 at 88. Combs then went back to sleep. Tr. Vol. 22 at 227-28. Williams, Gerald Anderson, and Robinson left to make change from the money they had stolen. Tr. Vol. 22 at 229-30.

When they returned between 3:30 and 4:00 a.m., Petitioner had moved the car containing Rodriguez closer to the house. Robinson saw Petitioner "in the trunk" of the car: "Half her body was in the trunk, like, one leg on the ground and leg in the trunk[.]" Tr. Vol. 22 at 234. The victim was face down in the trunk. Petitioner "had [a plastic] bag over the lady's head." Tr. Vol. 22 at 235. Robinson ran up and pushed Petitioner away. Tr. Vol. 22 at 235. Robinson could see that the victim was not breathing. Robinson tried to pull the plastic bag off, but it tore when he tried to remove it. Tr. Vol. 22 at 235-36. The victim was already dead. Robinson panicked and asked Petitioner "what the hell she was doing." Tr. Vol. 22 at 237. Robinson testified at trial that

Robinson: . . . I wanted to let the lady go. I never meant to hurt the lady at all. That wasn't part of my plan.

The State: It wasn't part of your plan, but that's what was happening to you. You were in it, right?

Robinson: I was getting in it deeper and deeper by the second. Everything turned out to be a lie, so I was just off in it too deep.

The State: When you said, "What are you doing," what did she say?

Robinson: She said this is her baby, this is her husband's baby. You know what I'm saying?

The State: She says it's her husband's baby?

Robinson: It's her husband's baby and the lady was having – like I said, the lady was with her husband, that was her husband's baby, and she's taking the baby back.

The State: Was [Petitioner] crying, laughing, jumping?

Robinson: No, she was fake crying. She was fake crying, like, "This is

> my husband's baby." It wasn't real tears or nothing, it was all a part of her game.

Tr. Vol. 22 at 238-39. Petitioner told them that she wanted to dispose of the victim's body because she had to return the car to the rental agency. Tr. Vol. 23 at 97-99. Petitioner wanted to burn the body, but Combs would not let her destroy the body at his grandmother's house. Tr. Vol. 23 at 9899.

A few minutes later, one of Robinson's friends arrived. Petitioner closed the trunk so that he would not see the body. Tr. Vol. 22 at 239-40. Robinson left, but first told Petitioner to get her car off the property. Tr. Vol. 22 at 239-40. When Robinson returned fifteen minutes later, Petitioner was still there. Petitioner refused to drive her car because the victim's body was inside. Tr. Vol. 22 at 240-41.

Robinson drove Petitioner and baby Ray to her hotel room in another car. Tr. Vol. 22 at 24344. Robinson saw many baby items in the hotel room. Tr. Vol. 22 at 243-44. Before Robinson left, he confronted Petitioner, asking her "[W]hy did she play us like that, you know, and all the time she knew what she wanted a baby all the time, you know. You know, she knew it wasn't no drugs, no money in the house." Tr. Vol. 22 at 244. Petitioner "just looked stupid. She just looked like she wasn't concerned about what [he was] saying. She was just looking at [him] like, 'You're in it too deep. You are already in it.'" Tr. Vol. 22 at 245. Petitioner told him that "she was going to make everything good by another . . . drug rip for that morning[.]" Tr. Vol. 22 at 246.

Robinson returned to the Van Zandt Street address and went to sleep. When he awoke at about 9:00 a.m., Petitioner had arrived in her daughter's black Chevrolet.

Tr. Vol. 22 at 247-48. Petitioner concocted two plans: either to drive the rental car to Louisiana and dump Rodriguez's body in a swamp or burn the corpse. Tr. Vol. 22 at 248-49, 257. Petitioner kept "throwing it in [their] face. 'We are in this together. We are in this together." Tr. Vol. 22 at 249. No one agreed to follow her plans.

Petitioner talked Robinson and Gerald Anderson into doing another "lick." Gerald Anderson and another unidentified man left in one car, Robinson, Petitioner, and baby Ray went in another. En route, Petitioner received a call on her cell phone. She told Robinson that they had to return because the police were looking for her. Tr. Vol. 22 at 252. Robinson drove Petitioner to a location where she told him to wait. When she did not return, Robinson returned to the Van Zandt Street home with baby Ray. Tr. Vol. 22 at 254-55.

Robinson tried to remove fingerprints from both of Petitioner's cars. Tr. Vol. 22 at 258-59; Vol. 23 at 108-09. Robinson found a gun in Petitioner's car and put it in the house. Tr. Vol. 22 at 261. Robinson sprayed Lysol in the rental car to lessen the smell coming from the victim's corpse. Robinson kept baby Ray in the black Chevrolet with the engine running so that the air conditioner would keep the baby cool. Robinson and his cousin talked about dropping baby Ray off at a church. Tr. Vol. 22 at 256; Vol. 23 at 109-110.

At some point on May 16, Petitioner called Corona to tell him that she would have a baby that day. Tr. Vol. 20 at 209. At around 4:30 p.m., Petitioner called Corona to tell him that she needed to go to the police station. Tr. Vol. 20 at 210. The police also asked Corona to go to the police station. Tr. Vol. 20 at 210. When Corona saw Petitioner, he asked if she had the baby. Petitioner responded, "Not yet." Tr. Vol. 20 at 211. Corona later found out that she was never pregnant. Tr. Vol. 20 at 211.

IV. Guilt/Innocence Phase

The State of Texas indicted Petitioner for the capital murder of Joana Rodriguez. The indictment alleged that Petitioner "unlawfully, while in the course of committing and attempting to commit the kidnappping of JOANA RODRIGUEZ, intentionally cause the death of JOANA RODRIGUEZ by asphyxiating JOANA RODRIGUEZ by an unknown manner and means." Clerk's Record at 28. Petitioner originally hired her own attorney, but when her family could not pay his fees, the trial court appointed Jerry Guerinot and Windi Akins to represent her at trial. For the most part, the Court will refer to Petitioner's trial attorneys collectively as "trial counsel."

Trial testimony revealed the factual scenario outlined above. Other evidence at trial also inculpated Petitioner. While incarcerated, Petitioner asked an inmate, Sarah Hernandez, to copy a letter for her because she did not want it in her own handwriting. Tr. Vol. 23 at 159. The letter claimed to be from someone named "Oscar" and related that Robinson and Combs borrowed Petitioner's car, placed the baby and the victim in her cars, and framed Petitioner because of her race. Tr. Vol. 23 at 160-62. The letter also claimed that Robinson and Combs set her up to harm her "brother" who worked for the DEA. Tr. Vol. 23 at 160. Hernandez copied the letter. When the scheme fell apart, Petitioner threatened Hernandez. Tr. Vol. 23 at 167-68.

The jury instructions allowed for Petitioner's conviction as the principal actor or as a party to the victim's murder. On February 21, 2002, a jury found Petitioner guilty of capital murder.

V. Punishment Phase Testimony

The trial court held a two-day punishment hearing to decide Petitioner's sentence. Texas law required the jury to answers three special issue questions at the conclusion of the punishment phase testimony:

Special Issue No. 1

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Linda Carty, would commit criminal acts of violence that would constitute a continuing threat to society?

Special Issue No. 2

Do you find from the evidence beyond a reasonable doubt that Linda Carty, the defendant herself, actually caused the death of Joana Rodriguez, on the occasion in question, or if she did not actually cause the death of Joana Rodriguez, that she intended to kill Joana Rodriguez, or that she anticipated that a human life would be taken?

Special Issue No. 3

Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, Linda Carty, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

Tr. Vol. 205-07.

The prosecution's punishment case

The prosecution called several witnesses to show that Petitioner lived a life of lawlessness. In 1992, Petitioner pleaded guilty to automobile theft. Tr. Vol. 25 at 7. A probation officer testified that Petitioner had been placed on a ten year term of probation. Tr. Vol. 25 at 10-13. The probation officer testified that she complied with most of the terms of her probation, though she failed to report one month and failed to update her address. Tr. Vol. 25 at 13-14. Petitioner was still on probation when arrested for capital murder.

Trial testimony disclosed the facts of the automobile theft, how that crime led to Petitioner's status as a confidential informant, and how her drug crimes made her unusable to the government. In 1992, Petitioner took a car to a dealership for repair. Petitioner falsely claimed to be an F.B.I. agent. Tr. Vol. 25 at 18-19, 27. Petitioner rented a car that she never made payments on or returned. Tr. Vol. 25 at 19-20. The F.B.I. began investigating Petitioner for impersonating an officer and for auto theft. Tr. Vol. 25 at 25-26. Petitioner was eventually arrested and charged with auto theft in state court. Tr. Vol. 25 at 39. Petitioner entered into a contract with the State agreeing to provide information that would lead to drug arrests. Tr. Vol. 25 at 48-50. Specifically, Petitioner agreed to "put together deals . . . that amount[ed] to 2,000 grams of cocaine . . . and pay off some restitution [in the amount of] $8,000." Tr. Vol. 25 at 62.

Petitioner did not enter the drug world as an informant to avoid spurious criminal charges. Petitioner did not "bec[o]me involved in the drug subculture as an informant." (Docket Entry No. 32 at 4). Petitioner became a confidential informant because she was involved in the drug subculture; the State entered into a contract with Petitioner because "[s]he hung around with these people [who sold large amounts of cocaine]. She was in the know." Tr. Vol. 25 at 63. Petitioner provided information that led to two arrests. Tr. Vol. 25 at 63-64. Her efforts, however, did not follow government policy.

She repeatedly engaged in drug deals without giving the government adequate notice. Tr. Vol. 25 at 64-72, 80, 82. She was an "uncontrollable" informant. Tr. Vol. 25 at 82. In fact, one officer described her as "sly, slick and really uncontrollable in terms of a confidential informant." Tr. Vol 25 at 90.

As part of the contract, Petitioner agreed not to break any laws. Tr. Vol. 25 at 50. Petitioner was soon arrested on drug charges. Tr. Vol. 25 at 50-51. Specifically, she was charged with possession of marijuana. Tr. Vol. 25 at 86. Petitioner was arrested when a different confidential informant told the police about a large marijuana transaction. Tr. Vol. 25 at 97. The police set up surveillance at a house. Petitioner went to the house and came out with a package. Tr. Vol. 25 at 105-111. The police followed her. When she realized that she was being followed, Petitioner tried to get away. To end the resulting high-speed chase, a police car blocked the path of Petitioner's car. A police officer got out of his car, drew his weapon, and pointed it at Petitioner's car. Petitioner tried to run him over. Petitioner finally stopped and was arrested. Tr. Vol. 25 at 110-15. She told the arresting officer that she was working as a confidential informant. Tr. Vol. 25 at 115. The police found $3,900 in cash, 50 pounds of marijuana, and a gun in her car. Tr. Vol. 25 at 117-18. Her possession of marijuana was not related to her status as a drug snitch, Tr. Vol. 25 at 86-87, thus voiding her contract with the State. Tr. Vol. 25 at 51-52, 87. In fact, she was permanently barred from being an informant for the Houston Police Department. Tr. Vol. 25 at 87-88. Her marijuana charge, however, was eventually dismissed. Tr. Vol. 25 at 92.

The prosecution also presented sympathetic victim-impact and victim-character testimony from the victim's sister, father, and husband.

The defense's punishment phase case

Trial counsel faced a difficult challenge in the punishment phase. The jury already found their client guilty of a heartless crime. The prosecution showed that Petitioner was guilty of auto theft and drug offenses. Earlier testimony strongly questioned her credibility. The defense called witnesses in an attempt to show that Petitioner would not be a future danger. Also, the defense actively sought to place mitigating circumstances before the jury.

Dr. Jerome B. Brown, a psychologist, first testified for the defense. Dr. Brown prepared for his testimony by interviewing Petitioner twice, performing a battery of psychological tests, viewing police interrogation videos, and reviewing material that the trial investigator put together. Tr. Vol. 25 at 137; Vol. 28, Defendant's Exhibit 1. Dr. Brown testified that Petitioner

> had a fairly unremarkable background until she was about 21. She was raised in St. Kitts, which is one of the British West Indies, and did not come to the United States until she was about 21. During that time, she reports that her mother reported no special problems, no difficulties to speak of, fairly normal kind of upbringing, no violence, no mental illness in the family, no police trouble in the family, no history of stealing and fighting, any of those things[.]

Tr. Vol. 25 at 138-39. Petitioner "described [her early family life] as fairly stable, that she enjoyed a better-than-average life in her community or on that particular island. They were a little better off than most of the people there. She felt that she was spoiled, if anything." Tr. Vol. 25 at 143. Petitioner received a high school diploma. Tr. Vol. 25 at 139.

Dr. Brown testified that Petitioner "came originally to the United States to complete her education, but she did not. But she has attended some classes at the University of Houston and Houston Community College." Tr. Vol. 25 at 139. Petitioner described her employment history to Dr. Brown: "she had worked mainly as a pharmacy technician and a hairstylist; and then, of course, she then described considerable involvement with the Drug Enforcement Agency, the federal agents, and one in particular that she had been helping for a number of years in their drug surveillance." Tr. Vol. 25 at 139-40. Petitioner reported that she had two children: her 21-year-old daughter and "another child that was the result of a sexual assault, and she gave her up for adoption." Tr. Vol. 25 at 141. Petitioner claimed not to use alcohol or illegal drugs. Tr. Vol. 25 at 141-42. Petitioner described herself as a "bookworm. She likes to frequent the bookstores and read the books there." Tr. Vol. 25 at 142.

Petitioner gave Dr. Brown an "extremely lengthy and detailed" description of how she came to be arrested. Tr. Vol. 25 at 153. In a convoluted narrative, Petitioner described how "she's being retaliated against because of her activities of being the drug informant." Tr. Vol. 25 at 155. Petitioner, however, claimed that one of the men who set her up had been killed and the other could not be found. Tr. Vol. 25 at 156. Petitioner claimed that the State's premise – that she killed to acquire a baby – was "ridiculous, she would never do anything like that . . . . [S]he felt like she could still have babies herself." Tr. Vol. 25 at 156.

Dr. Brown found Petitioner to be of average intelligence. Tr. Vol. 25 at 157. He found "nothing that would indicate a pattern of problems with aggression or anger[.]" Tr. Vol. 25 at 157. Dr. Brown testified that she had an average ability to control her anger and that she would not use aggression to get what she wanted. Tr. Vol. 25 at 158. His testing showed that she would not participate in a deliberate act of violence against another. Tr. Vol. 25 at 159. Petitioner did not appear "callous" or "indifferent," but "naively defensive," and "very emotional . . . very fearful and . . . extremely concerned about what she was being accused of." Tr. Vol. 25 at 160. She was not "antisocial" and did not "fit into that category of people who typically are a continuing problem for the law." Tr. Vol. 25 at 161, 164. Dr. Brown was "unable to find any way to explain [the crime] in the evaluation results in terms of her character, structure, her past life history, or her basic personality characteristics." Tr. Vol. 25 at 162. Dr. Brown emphatically stated that she was not a violent person, did not have a history of violence, and was not prone to violence. Tr. Vol. 25 at 178. The only characteristic she shared with those who are categorically violent was "a history of some problems with the law." Tr. Vol. 25 at 179-80.

Dr. Brown did, however, find that Petitioner had "a gross exaggeration of reality." Tr. Vol. 25 at 162. Dr. Brown was concerned about her "grandiosity." Tr. Vol. 25 at 164.

The prosecution cross-examination went to great lengths to brand Petitioner as a liar. The prosecution had Dr. Brown admit that her testing scores showed that she made "naive attempts to cover up [her] personal problems." Her scores meant that "you really don't see yourself as other people may see you, that you see yourself as a person who has no difficulties even though other people may say, "Yeah, she's got problems.'" Tr. Vol. 26 at 19-20. However, that meant she was "naive" about herself, not that she was an "out-and-out liar[]." Tr. Vol. 26 at 23.

The prosecution asked Dr. Brown: "And would you agree with me that you haven't been in this trial, you don't know the facts of this case?" Tr. Vol. 26 at 36. While Dr. Brown agreed, his report showed not only a familiarity with the crime, but also with Petitioner's explanation of events. Tr. Vol. 28, Defense Exhibit 1. The prosecution also compared the information Petitioner gave Dr. Brown with her criminal history. When the prosecution reviewed the facts of the crime Petitioner committed, Dr. Brown still would not say that Petitioner was dangerous, though he hedged on that statement when asked to give his opinion "[a]s a human being and not a psychologist." Tr. Vol. 26 at 40-41.

The defense submitted Dr. Brown's report into evidence. Tr. Vol. 26 at 6. The report bolstered the defense's reliance on lingering doubt by stating: "because of the inconsistencies found between the present evaluation results and the charges made against her, a careful examination of the circumstances leading to these charges and their accuracy would be justified." Tr. Vol. 28, Defense Exhibit 1.

The prosecution presented Dr. Brown with a study from the National Center for Missing and Exploited Children that outlined the profile of a child abductor. Tr. Vol. 26 at 42-45. Dr. Brown conceded that Petitioner fit some descriptors from the profile. Tr. Vol. 26 at 44-45. On redirect, however, trial counsel emphasized that Petitioner did not exhibit the traits commonly held by violent individuals. Tr. Vol. 26 at 50-53.

Trial counsel called Enid Carty, the defendant's mother to testify. Trial counsel reviewed with Enid Carty how her daughter never exhibited tendencies common to those who commit violent acts. Tr. Vol. 26 at 56-59. Enid Carty also testified that "children love her. She's always kind and loving. . . . before she moved here, when she leave her school, she was a teacher at the school and every time I go home, all her children are always asking me about her and how they loved her and how she taught them well." Tr. Vol. 26 at 59. Enid Carty testified that Petitioner interacted well with others, that "[p]eople loved her. She reacts good with people." Tr. Vol. 26 at 60. Enid Carty pleaded "I do ask to spare her life. I know that she's not that type of child, that she's a miracle to me and she would not commit the crime that they said she has done." Tr. Vol. 26 at 61.

Trial counsel called Petitioner's daughter, Jovelle Carty. Trial counsel reviewed with her factors common to violent offenders and Jovelle Carty testified that her mother had none of the characteristics. Tr. Vol. 26 at 68-69. Jovelle Carty begged: "She didn't harm anyone. I'm sorry that the young lady was hurt. My mom didn't have anything to do with it . . . . She is not a mean person. She is not an evil person. She wouldn't hurt anyone." Tr. Vol. 26 at 70.

Cross-examination investigated the alibi story Petitioner told her daughter. Tr. Vol. 26 at 7073. Redirect examination emphasized Petitioner's confidential informant work for Charlie Mathis. Tr. Vol. 26 at 76-78.

Island De Souza, Petitioner's brother, also testified for the defense. Souza also testified that Petitioner did not exhibit those behaviors associated with violent individuals. Tr. Vol. 26 at 79-81. Souza testified that Petitioner was a good daughter and mother. Tr. Vol. 26

at 82-83. Souza described why the jury should spare his sister's life:

> I've always known her . . . all my life, and I've never known her to be a violent person all the years that I have known while residing in my home on the island and here. She's always been kind, and she's always been a gentle person. So it's, like, right now I'm kind of overwhelmed with all this stuff that is going on. It's like, that's not really the [Petitioner] that I know that they are talking about.

Tr. Vol. 26 at 84.

Closing Arguments

The prosecution began its initial closing argument by reviewing Texas' special issues and applying its interpretation of the facts to those questions. The prosecution relied on the jury's finding of guilt and encouraged them not to revisit that decision. The prosecution encouraged the jury to send a message that society would not tolerate Petitioner's callous crime.

Trial counsel's closing argument centered on four themes: (1) lingering doubt about Petitioner's involvement in the murder or her intent to kill; (2) a lack of future danger, especially emphasizing the prosecution's failure to show any violent acts while incarcerated; (3) the harshness and rigor of prison life would be a sufficient punishment; and (4) the mitigating evidence warranted a life sentence. Trial attorney Ms. Atkins' closing argument renewed the attack on the evidence showing Petitioner's guilt, laying blame for the crime on Robinson. Tr. Vol. 26 at 109-112. Trial counsel emphasized that, even if Petitioner indeed killed the victim to steal a baby, then a life sentence would guarantee that, when she was released, she would not commit a similar act again. Tr. Vol. 26 at 112-13. Trial counsel argued that "the D.A.'s have never shown, no evidence has ever shown that she has been a threat" while incarcerated. Tr. Vol. 26 at 109. Relying on Dr. Brown's report, trial counsel argued that Petitioner never displayed violence or characteristics common to those who commit violent crimes. Tr. Vol. 26 at 113-14. Trial counsel asked the jury to give effect to the mitigating evidence, including that showing she gave birth to a child conceived from a sexual assault. Tr. Vol. 26 at 107.

Trial attorney Mr. Guerinot also delivered a closing argument. Trial counsel emphasized that a life sentence would place Petitioner in prison for "a long, long, long, long, long time." Tr. Vol. 26 at 120. Trial counsel argued that Petitioner had been and would continue to be a model prisoner, free of violence. Tr. Vol. 26 at 120-21. Specifically, trial counsel argued: "Don't you think if we talk about what is the best predictor of what someone is going to do in the future, you look and say, 'Well, what has she done while she's been in jail?' Well, what have they proved to you? What did they say? Have they called one person from jail?" Tr. Vol. 26 at 120. Trial counsel argued that "Linda Carty is not going to do any more killing. She is going to prison for at least the rest of her life. That's a terrible punishment." Tr. Vol. 26 at 123. Trial counsel urged the jury to consider the mitigating evidence, particularly that from Dr. Brown. Tr. Vol. 26 at 123-24.

The prosecution's final closing argument followed two themes: (1) Petitioner was a manipulator and (2) the vicious and heartless nature of Petitioner's crime cried out for the death penalty. The prosecution focused on the victim's suffering and her family's loss to secure a death sentence.

The jury answered the special issues in manner requiring the imposition of a death sentence.

PROCEDURAL HISTORY

The Texas Court of Criminal Appeals affirmed Petitioner's conviction and sentence on direct appeal. *Carty v. State*, 2004 WL 3093229 (Tex. Crim. App. 2004) (unpublished). Petitioner also unsuccessfully sought state habeas review. The Court notes that there were procedural peculiarities in Petitioner's state habeas action which are discussed later in this opinion. The lower habeas court entered findings of fact and conclusions of law recommending that the Court of Criminal Appeals deny habeas relief. State Habeas Record at 771-95. The Court will cite the lower court's findings and conclusions by their internal page and paragraph numbers. The Court of Criminal Appeals adopted the lower court action and denied habeas relief without issuing a written order.

This federal action follows. Petitioner filed a comprehensive federal petition, listing many grounds for relief and making many factual and legal arguments. (Docket Entry No. 1). In an earlier order, this Court characterized Petitioner's grounds for relief as follows:

1. Trial counsel's representation fell below a constitutionally mandated level of effectiveness because her attorneys:
    a. failed to interview Jose Corona and inform him that Texas's spousal privilege would allow him to avoid testifying;

   b. failed to prepare adequately for trial;
   c. inadequately prepared an expert witness for trial;
   d. failed to prove in the punishment phase that Petitioner would not be a future societal danger;
   e. failed to show that Petitioner did not have the specific intent to murder the victim;
   f. failed to ask prospective jurors appropriate questions;
   g. failed to inform Petitioner of her right to consular access;
   h. failed to object to allegedly improper misstatements of the law by the prosecution and trial court;
   i. violated the attorney/client relationship by providing an affidavit on state habeas review;
   j. failed to withdraw as counsel of record;
   k. provided cumulatively deficient performance.

2. The State failed to inform Petitioner of her right to consular access under applicable international treaties.

3. The trial court erred by:
   a. improperly defining terms during jury selection and giving improper jury instructions;

   b. overruling Petitioner's objection to Texas' failure to assign a burden of proof on the mitigation special issue; and

   c. admitting hearsay statements made by accomplice witnesses.

4. Insufficient evidence supports Petitioner's conviction for capital murder.

5. The prosecution committed misconduct by:

   a. not informing Jose Corona of his right to spousal immunity;

   b. misstating the law of accomplice witness testimony; and

   c. colluding with trial counsel to produce an affidavit on state habeas review.

6. The cumulative effect of the errors at Petitioner's trial violated her constitutional rights.

While the instant habeas petition is lengthy and contains multifaceted arguments, Petitioner has not objected to the above characterization of her claims. This Court denied Respondent's initial summary judgment motion, primarily because questions lingered about the procedural status of several claims. (Docket Entry No 24). This case comes before the Court on Respondent Nathaniel Quarterman's renewed motion for summary judgment. (Docket Entry No. 28). Petitioner has filed a response. (Docket Entry No. 32). Petitioner has also filed a motion requesting an evidentiary hearing. (Docket Entry No. 34). Petitioner's petition is ripe for adjudication.

LEGAL STANDARDS

Federal habeas jurisdiction exists to determine whether an inmate "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). "The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983); *see also Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923) ("[W]hat we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved."). Accordingly, federal habeas proceedings honor the "presumption of finality and legality [that] attaches to [a petitioner's] conviction and sentence." *Barefoot*, 463 U.S. at 887.

The AEDPA

Federal courts give effect to the traditional limits of habeas review through the Anti-Terrorism and Effective Death Penalty Act's "(AEDPA") deferential review of state court judgments. "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases and to further the principles of comity, finality, and federalism[.]" *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (quotation and citation omitted). The AEDPA exists "to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). To that end, the AEDPA forbids habeas relief on issues "adjudicated on the merits" in state court unless the state decision "was contrary to, or an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

In application, these standards defer greatly to state adjudication. The Supreme Court has held that a state court decision is only "contrary to" federal precedent if: (1) the state court's conclusion is "opposite to that reached by [the Supreme Court] on a question of law" or (2) "the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000); *see also Cone*, 535 U.S. at 698; *Early v. Packer*, 537 U.S. 3, 7-8 (2002). A state court may unreasonably apply federal law if it "identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the particular facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407.

The AEDPA also affords significant deference to a state court's resolution of factual issues. Under 28 U.S.C. § 2254(d)(2) "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding[.]" *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). A federal habeas court must presume the underlying factual determinations of the state court to be correct, unless the petitioner "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Miller-El*, 537 U.S. at 341.

Nevertheless, a petitioner's compliance with 28 U.S.C. § 2254 does not create an entitlement to habeas relief. No Supreme Court case "ha[s] suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard[.]" *Horn v. Banks*, 536 U.S. 266, 272 (2002); *see also Robertson v. Cain*, 324 F.3d 297, 306 (5th Cir. 2003) (finding that 28 U.S.C. § 2254(d) "does not require federal habeas courts to grant relief reflexively"). Other judicial doctrines, such as the harmless-error doctrine and the non-retroactivity principle, bridle federal habeas relief. *See Thacker v. Dretke*, 396 F.3d 607, 612 n.2 (5th Cir. 2005). Any trial error cannot require habeas relief unless it "ha[d] a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Robertson*, 324 F.3d at 304 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993)); *see also Aleman v. Sternes*, 320 F.3d 687, 690-91 (7th Cir. 2003) ("Nothing in the AEDPA suggests that it is appropriate to issue writs of habeas corpus even though any error of federal law that may have occurred did not affect the outcome."). A habeas court likewise cannot grant relief if it would require the creation of new constitutional law. *See Horn*, 536 U.S. at 272 (relying on *Teague v. Lane*, 489 U.S. 288 (1989)).

Summary Judgment

Respondent has moved for summary judgment. Summary judgment is proper where the record shows "no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56. "As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000). In ordinary civil cases, a district court considering a motion for summary judgment must construe disputed facts in a light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor"). However, a court must view a summary judgment motion through "the prism of the substantive evidentiary burden." *Id.* at 254. Congress, through the AEDPA, has constricted both the nature and availability of habeas review. The Rules Governing Section 2254 Cases in the United States District Courts, along with traditional habeas practice, also allow for the summary dismissal of habeas claims. This Court, therefore, applies general summary judgment standards only insofar as they do not conflict with the language and intent of the AEDPA or other habeas law. *See Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002) ("[Rule 56] applies only to the extent that it does not conflict with the habeas rules."), *overruled on other grounds by Tennard v. Dretke*, 542 U.S. 274 (2004); Rule 11 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS ("The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules."). Where the state courts have already resolved a prisoner's factual allegations by express or implicit findings, and the prisoner fails to prove by clear and convincing evidence that 28 U.S.C. § 2254(e)(1)'s presumption of correctness should not apply, construing facts in her favor is inappropriate and unauthorized.

Petitioner presented many of her claims in state court. The state courts issued detailed findings of fact and explicit conclusions of law with respect to each exhausted claim. Accordingly, the AEDPA largely guides this Court's summary judgment review. With respect to any issue falling outside the AEDPA standards, federal law plainly allows for summary dismissal if unexhausted claims lack merit. *See* 28 U.S.C. § 2254(b)(2). Even then, facts that the Texas state courts have decided adversely to Petitioner bind this Court unless she sufficiently refutes them.

PROCEDURAL ADEQUACY OF PETITIONER'S CLAIMS

Petitioner raises six grounds for relief, most of which involve complex sub-arguments. As a precursor to federal review of her conviction and sentence, Petitioner must show that she presents her claims in a procedurally adequate manner. Importantly, long-standing federal practice requires a habeas petitioner to give the state courts the first full opportunity to consider constitutional claims. Before adjudicating the merits of Petitioner's arguments, the Court must decide whether she adequately advanced her claims in state court.

I. Exhaustion of State Court Remedies

Under 28 U.S.C. § 2254(b)(1), [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State[.]" Exhaustion "reflects a policy of federal-state comity designed to give the State an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Anderson v. Johnson*, 338 F.3d 382, 386 (5th Cir. 2003) (internal citations and quotations omitted). As this Court noted in an earlier order, serious questions exist as to whether Petitioner adequately exhausted federal claims 1(a), (b), (d), (f), (i), (j); 2; 3(a); 4, and 5(a)-(c). Petitioner did not raise those claims in her initial state habeas application, but identified them for the first time in a third responsive state habeas pleading.

Because the Texas courts did not explicitly adjudicate the claims, the Court must inquire into whether Petitioner sufficiently exhausted them.

Although Petitioner raised the challenged claims in state court, that alone is insufficient to meet the rigors of the exhaustion doctrine. Federal law "ask[s] not only whether a prisoner has exhausted his state remedies, but also whether he has properly exhausted those remedies, i.e., whether he *has fairly* presented his claims to the state courts." *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999) (emphasis added); *see also Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *Duncan v. Henry*, 513 U.S. 364, 366 (1995); *Castille v. Peoples*, 489 U.S. 346, 349-50 (1989). "The compromise of interests which underlies exhaustion doctrine requires that the federal courts assure themselves that the state courts have had a fair opportunity to pass on a petitioner's claims before they assume habeas jurisdiction[.]" *Carter v. Estelle*, 677 F.2d 427, 444 (5th Cir. 1982). To comply with the "fair presentation" requirement, a petitioner "must present his claims in a procedurally correct manner." *Beazley v. Johnson*, 242 F.3d 248, 263 (5th Cir. 2001) (quoting *Deters v. Collins*, 985 F.2d 789, 795 (5th Cir. 1993)); *see also Carter*, 677 F.2d at 443 ("If a petitioner wishes to exhaust his claims, he is expected not only to use the normal avenues of relief but also to present his claims before the courts in a procedurally proper manner according to the rules of the state courts.").

Before turning to how Petitioner litigated her case in state court, the Court pauses to review the manner that the Texas Legislature has designed for advancing capital habeas claims. The Texas State Constitution guarantees a habeas remedy and explicitly states that "[t]he Legislature shall enact laws to render the remedy speedy and effectual." TEX. CONST., art. I, § 12; *see also Ex* *parte Davis*, 947 S.W.2d 216, 219 (Tex. Crim. App. 1996). In 1995, the Texas Legislature codified the judiciary's abuse-of-the-writ doctrine in Article 11.071 of the Texas Code of Criminal Procedure. The Texas Legislature created its capital habeas scheme "to speed up the habeas corpus procedures for capital cases" and "provide an effective habeas remedy." *Ex parte Smith*, 977 S.W.2d 610, 614 (Tex. Crim. App. 1998); *Ex parte Brooks*, 219 S.W.3d 396, 399 (Tex. Crim. App. 2007); *Ex parte Graves*, 70 S.W.3d 103, 115 & n.50 (Tex. Crim. App. 2002).

Texas statutory law presents clear, explicit means by which a capital inmate raises habeas claims in accordance with the state legislative and constitutional hope for expediency. *See Ex parte Blue*, 230 S.W.3d 151, 155 -156 (Tex. Crim. App. 2007) ("[I]t is . . . well established that the Legislature may regulate the right to the writ of habeas corpus[.]"). The Texas Legislature created a system dependant on observing strict time limitations. Texas' capital habeas statute requires the inmate to file an application for a writ of habeas corpus in the trial court, "returnable to the court of criminal appeals," on the later of two dates: (1) "the 180th day after the appointment of counsel" or (2) "the 45th day after the date the [State's] original brief is filed on direct appeal." TEX. CODE CRIM. PRO. art. 11.071 § 4(a) (Vernon 1997). The statute provides for only one 90-day extension of the filing period. *See* TEX. CODE CRIM. PRO. art. 11.071 § 4(a) (Vernon 1997).

Texas' statutory habeas procedure does not generally authorize the insertion of new claims late in a habeas case. No statutory provision explicitly allows for the amendment of habeas applications. If an inmate files any amendment outside of art. 11.071 § 4(a)'s time constraints, Texas law usually treats that pleading as a new habeas action: "If an *amended* or supplemental application is not filed within the time specified under Section 4(a) or (b), the court shall treat the application as a subsequent application under this section." TEX. CODE CRIM. PRO. art. 11.071 § 5(f) (emphasis added). Accordingly, inmates are essentially limited to state habeas review of the claims that they identify and brief in their initial habeas application unless they act quickly to amend. *See Ex parte Guevara*, 2007 WL 1493152, *1 (Tex. Crim. App. 2007) (unpublished) (dismissing claims raised in a tardy amendment); *Ex parte Esparza*, 2007 WL 602812, *1 (Tex. Crim. App. 2007) (unpublished) (same); *Ex parte Young*, 2006 WL 3735395, *1 (Tex. Crim. App. 2006) (unpublished) (same); *Ex parte Acker*, 2006 WL 3308712, *1 (Tex. Crim. App. 2006) (unpublished) (same); *Ex Parte McGowen*, 2006 WL 2615541, *1 (Tex. Crim. App. 2006) (unpublished) (same); *Ex parte Hathorn*, 2006 WL 2615525, *1 (Tex. Crim. App. 2006) (unpublished) (same); *Ex Parte Tercero*, 2005 WL 3072105, *1 (Tex. Crim. App. 2005) (unpublished) (same); *Ex parte Watts*, 2005 WL 2659444, *1 (Tex. Crim. App. 2005) (unpublished) *(same); Ex parte Vasquez*, 2005 WL 287504, *1 (Tex. Crim. App. 2005) (unpublished) (same); *but see Coleman v. Dretke*, 395 F.3d 216, 220-21 (5th Cir. 2004) (finding in the distinguishable context of TEX. CODE CRIM. PRO. art. 11.07 – which makes no limitation on the amendment of pleadings and the timeliness of filing as does Texas' comparable capital habeas provisions – that a claim raised in a responsive pleading by a *pro se* inmate was exhausted). Federal courts recognize Texas' limitation on tardy capital amendments as an adequate and independent state-law bar to federal review. *See Whitaker v. Quarterman*, 200 F. App'x 351, 356 (5th Cir. 2006).

Because Petitioner did not include federal claims 1(a), (b), (d), (f), (i), (j); 2; 3(a); 4, and 5(a)-(c) in her initial habeas application, but presented them instead in a pleading that she filed well outside art. 11.071 § 4(a)'s time frame, conventional state habeas law would treat her pleading as a successive habeas application. The Texas courts, however, apparently ignored her new claims. This Court asked the parties to brief the question of whether she properly presented her claims to the Texas courts.

II. Initial State Habeas Application and Petitioner's Attempts to Amend

A detailed review of Petitioner's state habeas proceedings shows that she was aware of Texas' limitation on the amendment of habeas applications. Petitioner and others unsuccessfully tried to amend her habeas application outside Texas' standard procedure. The record suggests that the Texas courts never considered Petitioner's late-filed claims to be properly before them.

Soon after sentencing, the trial court appointed Kurt Wentz to represent Petitioner during the state habeas process. Through appointed counsel, Petitioner filed a lengthy state habeas application on August 6, 2003, raising 30 claims and requesting that the trial court hold an evidentiary hearing. State Habeas Record at 2-172. At that point, no time remained for the filing of an amended habeas application under TEX. CODE CRIM. PRO. art. 11.071 § 5(f).

One of Petitioner's claims alleged that her trial attorneys provided constitutionally ineffective representation by not advising her that, as a citizen of St. Kitts and the United Kingdom, she had a right to consular assistance under the Vienna Convention. During state habeas review, the British Government became aware of Petitioner's citizenship. On February 2, 2004, the British

Government filed a "Motion to Suspend Proceedings, and Application for a Reasonable Time for Consular Assistance to Supplement Post-Conviction Writ of Habeas Corpus." State Habeas Record at 183-222. The British Government's pleading did not seek to intervene into the state habeas proceedings, but rather asked for time to retain counsel on Petitioner's behalf who would amend her habeas application. State Habeas Record at 222. Calling Petitioner's initial habeas application "extraordinarily cursory," State Habeas Record at 190, the British Government's pleading impugned the efforts of Petitioner's appointed habeas counsel and outlined issues that should have been raised in Petitioner's initial habeas application, many of which are similar to the claims advanced on federal review. The pleading recognized that Texas procedure would not allow Petitioner to raise new issues at that stage, but still asked the trial court to grant "[a] period of 180 days" in which "any amendment or supplement filed in that time should be accepted without the application of Art. 11.071 (5)(f)." State Habeas Record at 222. The British Consulate also wrote a letter to Harris County District Attorney Charles A. Rosenthal asking for "additional time in which to prepare her petition for a writ of habeas corpus." State Habeas Record at 225.

On February 5, 2004, the State filed an answer addressing the 30 claims raised by Petitioner's initial habeas application. State Habeas Record at 229-80.

On February 9, 2004, the trial court denied the British Government's motion for the substitution of counsel and amendment of Petitioner's habeas application. State Habeas Record at 222. The trial court's notation stated that the motion was denied "for want of jurisdiction." State Habeas Record at 222.

Mr. Wentz filed a 100-page reply to the State's answer on February 23, 2004. State Habeas Record at 282-382. Mr. Wentz emphasized that he was "*not* . . . retained to represent Ms. Carty" but filed the reply "as an accommodation for those British parties who are trying to secure meaningful assistance for Ms. Carty." State Habeas Record at 284 n.4. Mr. Wentz stated that his lengthy application and reply did not constitute "meaningful assistance" or represent "an adequate factual and legal investigation into her case." State Habeas Record at 284, n.4. The reply asked for time to "amend [Petitioner's] application for a writ of habeas corpus without the application of relevant time constraints to "complete a proper application for a writ of habeas corpus." State Habeas Record at 382. The reply, however, did not explicitly state that Petitioner wanted to insert new claims into the proceedings. Petitioner again asked the state habeas court to "[s]uspend[] the proceedings for 180 days to allow her to amend her application for a writ of habeas corpus without the application of Art. 11.071 (5)(f)." State Habeas Record at 382. The trial court did not enter any order that would allow for the amendment of pleadings.

Mr. Wentz filed a further response ("second reply") on March 31, 2004. State Habeas Record at 403-06. The second reply provided additional evidentiary support and again requested a hearing, but did not advance new claims. The second reply, however, for the first time asked the trial court to allow the British Government to intervene in Petitioner's habeas proceedings. State Habeas Record at 405-06.

The British Government also secured the participation of attorneys from the law firm of Baker Botts ("Baker Botts attorneys"). A later filing clarifies how the Baker Botts attorneys came to represent Petitioner. Linda Kelly, a

"Consular Official of the United Kingdom, based at the British Consulate in Houston, Texas," described their introduction as follows:

> In April 2004 the law firm of Baker Botts, L.L.P. was approached by lawyers from the firm Clifford Chance and asked to take on Ms Carty's case. The Consulate confirmed with Ms Carty that she wanted to instruct Baker Botts to represent her and informed Baker Botts accordingly. Baker Botts subsequently agreed to represent Ms Carty on a pro bono basis. The engagement of Baker Botts corresponds with the British Government's policy of facilitating the provision of appropriate pro bono legal assistance to British nationals facing the death penalty overseas.

State Habeas Record at 650. On May 28, 2004, the Baker Botts attorneys entered an appearance as "co-counsel" for Petitioner. State Habeas Record at 477.

By this time, the initial application had been on file for over nine months, the State of Texas had filed a response, Petitioner's appointed attorney had filed two replies, and the trial court had rejected efforts to file an out-of-time amendment. The parties dispute whether an agreement at that point allowed Petitioner to insert new claims into the habeas proceedings. Statements made in a later hearing suggest that the trial court and the State agreed to give new counsel time to become familiarized with the record and file an "additional further response." Nothing in the record, however, suggests that the parties and state habeas court agreed to suspend TEX. CODE CRIM. PRO. art. 11.071 §5's limitation on tardy amendments.

Petitioner's pleadings argue that she had an "understanding" with the State "allow[ing] for the filing of her Additional Further Response and proposed findings and conclusions" that "[t]he state habeas court was aware of and approved[.]" Petitioner understood that her Baker Botts attorneys' role was "to supplement her state habeas application[.]" (Docket Entry No. 32 at 6). Petitioner alleges that the State "agreed that an additional period of almost six months was warranted for Baker Botts to familiarize itself with Carty's case, to perform an investigation, and to do whatever else it needed with regard to her state habeas petition." (Docket Entry No. 32 at 7). Assuming those statements to be true, they still do not show that the Texas courts and State *could* set aside Texas statutory law. Nor does it prove that there was an agreement that Petitioner would insert new claims into the habeas proceedings.

While Petitioner arguably shows that the State agreed that new counsel would be afforded time to research her case and file *something*, she has not shown that the State and the courts sanctioned a departure from the rules governing habeas practice. Petitioner provides no affidavit, statement, or verifiable indication that the State agreed to bypass state law and allow the insertion of new habeas claims into the state proceedings in notwithstanding TEX. CODE CRIM. PRO. art. 11.071 § 5. While Petitioner has otherwise requested that this Court hold an evidentiary hearing, she has not suggested that any witness could testify that an agreement existed to contravene Texas procedure and has not outlined any proposed testimony that would be helpful on this issue.

Respondent, on the other hand, has submitted an affidavit from Neelu Sachdeva, an Assistant Harris County District Attorney, stating that "Where was no agreement between the State and habeas counsel concerning habeas counsel filing 'Additional Further Response to Respondent's Original Answer' and no agreement between the State and habeas counsel as to the substance of such document." (Docket Entry No. 29, Exhibit 2). This evidence supports a finding that Petitioner's attempt to amend was untimely, unauthorized, and ineffective to exhaust state remedies.

Even if the assistant district attorney's affidavit is incorrect and an agreement existed, nothing now before the Court suggests that the State and trial court agreed to suspend the application of TEX. CODE CRIM. PRO. art 11.071 § 5. Particularly unhelpful is the fact that the parties apparently agreed that they would file proposed findings of fact and conclusions of law on the same day that Petitioner filed her third response. The filing of proposed findings and conclusions on the same date shows that the court and the State did not anticipate that Petitioner would insert into the proceedings any claims needing a response, requiring the designation of unresolved factual issues, or requesting relief beyond that found in her application.

III. Petitioner's Third Response

On November 1, 2004, Petitioner's new attorneys filed a third response to the State's original answer. She did not designate her filing an amended application, but an "Additional Further Response to Respondent's Original Answer" (hereinafter referred to as "third response"). State Habeas Record at 485-697. Petitioner's third response did not affirmatively state that she intended to raise new claims, but said that "counsel for Petitioner and the State agreed to additional time for Carty's counsel *to examine Carty's claims further.*" State Habeas Record at 491 (emphasis added). Nevertheless, the third response attempted to insert many new claims into the state habeas action. Specifically, Petitioner raised claims 1(a), (b), (d), (f), (i), (j); 2; 3(a); 4, and 5(a)-(c) from her federal petition for the first time in her third response.

Petitioner filed proposed findings of fact and conclusions of law contemporaneous with her third response. State Habeas Record at 698-768. That same date, the State also filed its proposed findings and conclusions. State Habeas Record at 771-95. Petitioner's proposed findings and conclusions addressed her new claims; the State's understandably did not. The State's proposed findings listed the only claims that were properly presented in Petitioner's original state habeas application and did not cover the issues raised for the first time in the third response.

On November 20, 2004, the state habeas court held a brief hearing to entertain argument concerning the parties' filings. While Petitioner's attorneys discussed issues raised only in the third response, neither the State nor the court complained that those issues were not properly presented. Likewise, Petitioner's attorneys did not complain that the State's proposed findings and conclusion omitted reference to her new claims. This point is telling because Texas courts often – almost always – adopt the State's proposal without alteration.

On December 2, 2004, the trial-level habeas court signed the State's findings and conclusions that did not address any issue raised for the first time in the third response. State Habeas Record at 797. The trial-level habeas court transferred the case to the Court of Criminal Appeals. Petitioner did not file any pleading in the trial-level or appellate court that pointed out that several claims had not been addressed in the proposed findings and conclusions.

The Court of Criminal Appeals adopted the lower court action and denied relief. The Court of Criminal Appeals noted that Petitioner raised "thirty allegations in her application," proving that the Texas courts only adjudicated those claims presented in the original state habeas application. *Ex parte Linda Carty*, WR-61,055-01 (Tex. Crim. App. March 2, 2005) (unpublished).

Nothing in the record suggests that the Texas courts ruled on her other claims *sub silentio*. Despite the clear lack of adjudication, Petitioner did not complain to the Texas courts that they did not rule on her new claims. Nonetheless, the question of whether Petitioner fairly presented her claims to the Texas courts is separate from the question of whether the Texas courts denied her claims on the merits, dismissed those claims on procedural grounds, or ignored them completely. *See Smith v. Digmon*, 434 U.S. 332, 333 (1978) ("It is too obvious to merit extended discussion that whether the exhaustion requirement of 28 U.S.C. § 2254(b) has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim[.]"); *Carter*, 677 F.2d at 444 ("The question of whether a state has had a 'fair opportunity' to consider a petitioner's constitutional claims is one for the federal courts to decide with all due respect for the integrity of state judicial processes; whether the state believes it has had an opportunity to pass upon the claims in light of its various procedural requirements is an important factor in this determination, but it is not dispositive.").

The instant proceedings followed.

IV. Availability of Federal Review

Respondent has not explicitly waived exhaustion *as* required by 28 U.S.C. § 2254(b)(3) ("A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement."). Notwithstanding the complexity of the state habeas record, the question this Court must answer in deciding whether Petitioner sufficiently exhausted her claims is simple: did she place her claims before the state courts in a procedurally proper manner?

Legal systems inherently disfavor advancing new causes of action late in the adjudicative process. No legal basis exists in state habeas law — or in legal procedure generally — for advancing a new cause of action concurrent with proposals for adjudication (such as proposed findings and conclusions). Specifically, Texas law does not allow for filing new claims long after a habeas application. No Texas law equates a third responsive pleading with the amendment of a habeas application. Texas' strict capital habeas requirements establish a presumption that filings not complying with their strictures are not properly before the state courts.

Petitioner emphasizes that some agreement existed for her to file new claims. Petitioner points to no Texas law allowing the parties or lower courts to agree to contravene standard habeas practice. That the parties filed proposed findings and conclusions on the same day as the third response strongly – nearly conclusively – signals that the State and courts did not anticipate that she would assert new grounds for relief. Even if an agreement allowed her to file *something*, Petitioner has not shown that the parties agreed to suspend the application of TEX. CODE CRIM. PRO. 11.071 §5(f), as was previously requested. The state habeas court had already rejected efforts to insert new claims into her habeas action. If this Court should assume anything it would be that Texas would have applied its statutory law and silently dismissed her claims as procedurally defaulted. *See Wallace v. Duckworth*, 778 F.2d 1215, 1223 (7th Cir. 1985) ("To expect state courts to ignore their own rules would be contrary to the purposes behind the exhaustion rule.")

Even if an agreement to amend her application existed, Petitioner knew that her new claims did not receive judicial review at the trial level. No effort was made in the trial level or appellate court to champion her new claims after the trial court obviously did not rule on them. Petitioner did not inform the Court of Criminal Appeals of the alleged extra-record agreement to file new claims. State adjudication proceeded without consideration of her new claims. Petitioner now claims that the state habeas court violated her constitutional rights by ignoring the claims. (Docket Entry No. 1 at 22-24). The state courts were the best forum for fully addressing that argument. Federal courts have no supervisory power over the state habeas process. Still, because Petitioner did not alert the state courts to their failure to rule on her new claims, the Court must decide whether she provided them an adequate opportunity for adjudication.

Petitioner simply did not place her claims before the state courts in a habeas application, an amended application, or by any other traditional means that would comply with Texas procedure. The unexhausted nature of her claims results in a federal procedural bar. While Petitioner fleetingly mentions that "there may still be a state court remedy still available," (Docket Entry No. 32 at 29), she has not pointed to anything in Texas law that would allow her to reopen her state action or any circumstance that would exclude her from the strict prohibition on successive state habeas actions. Because the Texas courts would certainly find her claims to be an abuse of the writ if Petitioner now tried to raise them in a successive habeas application, a procedural bar forecloses federal review. *See Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997) (citing *Coleman v. Thompson*, 501 U.S. 722, 734 n.1 (1991)).

A procedural bar is not insuperable. A petitioner may overcome the procedural default after an adequate showing of cause and prejudice. *See Coleman*, 501 U.S. at 750. Petitioner seeks to overcome the procedural bar by arguing that: (1) she did not "sandbag" her claims but worked out an understanding for her new attorneys to work on her case; (2) the State agreed to let her "supplement" her state habeas pleadings; and (3) the state habeas court did not explicitly treat her new claims as a subsequent habeas application under art. 11.071 § 5. All these arguments, however, dance around one blanket complaint: her appointed habeas counsel did not raise the claims in her initial habeas application. Petitioner does not argue that the claims she raised in her third response were unavailable before that time. Exhaustion has become an issue in this case because appointed habeas counsel did not raise the claims when he should have — in a timely actual or amended habeas application. Ineffective assistance of state habeas counsel cannot serve as cause. *See Ries v. Quarterman*, 522 F.3d 517, 526 (5th Cir. 2008); *Matchett v. Dretke*, 380 F.3d 844, 849 (5th Cir. 2004); *Elizalde v. Dretke*, 362 F.3d 323, 330 (5th Cir. 2004).

Petitioner also has not shown prejudice. She argues that "[b]ecause of circumstances beyond Carty's and her habeas counsel's control, the powerful bases for habeas relief raised in Carty's Additional Further Response . . . therefore would never be subjected to any state or federal habeas court review." (Docket Entry 32 at 35). Again, this only restates an ineffective-assistance-of habeas-counsel claim. Petitioner shows nothing (other than negligence) that prevented her appointed attorney from raising the claims in her otherwise comprehensively briefed initial habeas application.

A final safety valve exists against unfair imposition of a procedural bar: a petitioner may show that a fundamental miscarriage of justice would exist if the courts could not reach her claims. The Supreme Court has made clear that the miscarriage of justice exception extends to cases in which the Constitutional violation "has probably resulted in the imposition of a death sentence upon one who is actually innocent of a death sentence." *Moore v. Quarterman*, 454 F.3d 484, 498 (5th Cir. 2006) (quotation omitted); *see also Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001). Actual innocence requires a showing that "as a factual matter, he did not commit the crime for which he was convicted." *Finley*, 243 F.3d at 220. Petitioner claims that, because of various errors, no reasonable juror would have found her death-worthy. As the Court will discuss later, the claims on which she bases her fundamental-miscarriage-of-justice argument do not command habeas relief, much less overcome the procedural bar. *See Sawyer v. Whitley*, 505 U.S. 333, 347 (1992).

The procedural bar of Petitioner's claims is a harsh result. The Court is not unsympathetic to the fact that, when the Baker Botts attorneys joined Petitioner's defense, they found themselves in a conundrum: they identified several serious concerns but Texas procedure tied their hands. Texas procedure left nothing to litigate at that point except the issues raised in the initial application. This is not to denigrate the efforts of initial state habeas counsel – he identified and thoroughly briefed several important issues. As unfortunately happens, though, claims arose after the procedural door was closed. Deciding whether Petitioner could have done more in the face of Texas procedure is an academic exercise. Federal courts have an important responsibility to honor not only the well-established exhaustion doctrine, but the statutory law of the States. The Court of Criminal Appeals obviously did not consider Petitioner's challenged claims to be properly before it. Petitioner now comes to federal court and asks not only for this Court to adjudicate her claims, but to do so without the AEDPA deference. The integrity of habeas law depends on inmates following state procedure, allowing the state courts the initial opportunity to consider constitutional claims, and then seeking federal review. Allowing an inmate to proceed on claims that were not sufficiently before the state courts dishonors comity, federalism, and finality — all reverent doctrines underlying the federal writ of habeas corpus. Petitioner's claims are not available for full federal consideration.

Petitioner has not properly presented her challenged claims, makes no adequate justification to excuse exhaustion, and demonstrates no procedural means by which this Court can consider the merits of her claims. Habeas relief is unavailable on the unexhausted claims. *See* 28 U.S.C. § 2254(b). Notwithstanding the unexhausted nature of Petitioner's claims, this Court retains jurisdiction to deny them on the merits. *See* 28 U.S.C. 2254(b)(2). In the interests of justice, this Court will briefly review Petitioner's unexhausted claims along with her related claims that the state courts adjudicated. In doing so, this Court cannot apply the AEDPA's deferential standards, which only govern claims "adjudicated on the merits" in state court. 28 U.S.C. § 2254(d). The Court, nonetheless, finds that they do not require habeas relief.

ANALYSIS

Petitioner makes interrelated claims that charge the trial court and the prosecution with inserting error into her criminal proceedings, and then faults trial counsel for not sufficiently objecting to or adverting that error. The Court will address the factual basis for Petitioner's trial error, prosecutorial misconduct, and other claims before turning to her allegations of ineffective trial representation. The Court will then consider whether the cumulative effect of the errors violated her constitutional rights.

I. Trial Court Errors (claim 3)

Petitioner contends that the trial court violated her constitutional rights by: (a) improperly defining terms for the jury; (b) failing to assign a burden of proof on Texas' mitigation special issue; and (c) admitting hearsay statements at trial. Petitioner only properly exhausted claim 3(b). Having reviewed Petitioner's allegations and the record, the Court finds that the trial court did not violate her constitutional rights.

A. Improper Definition of Terms (claim 3(a))

Petitioner claims that the trial court misstated the law during jury selection, implicitly removing the State's obligation to prove the charges against her beyond a reasonable doubt. Petitioner focuses on two categories of statements made by the trial court. First, Petitioner complains that the trial court discussed the predicate circumstances for a capital murder conviction without mentioning the specific intent requirement for that crime. In other words, each time the trial court explained what factors Texas law required for a capital-murder conviction, it did not always mention the intentional *mens rea*. Second, Petitioner faults the trial court for defining the phrase "criminal acts of violence" when Texas practice traditionally avoids elaborating on that concept. Petitioner alleges that, even though the jury charge properly informed the jury of the law, the trial court caused the jury to evaluate the evidence and trial testimony in an improper light.

1. Discussion of capital murder during jury selection

Under Texas law, a person commits capital murder if "the person commits murder" under certain circumstances. Tex. Penal Code § 19.03(a). In this case, the State of Texas charged Petitioner with "intentionally commit[ting] the murder in the course of . . . kidnappping[.]" *Id.* During jury selection, the trial court repeatedly illustrated crimes that may serve as a precursor to a capital murder charge. In one representative example, the trial court stated that "If you murder someone while you're in the course of committing a burglary or a robbery or a sexual assault, kidnapping, arson, then these murders become capital murders." Tr. Vol. 5 at 24. Petitioner records fifteen similar definitions by the trial court. Petitioner argues that, by not clarifying that the actor must commit that murder intentionally, the trial court authorized the jury to convict her without meeting all the elements of capital murder beyond a reasonable doubt.

Respondent contends that Petitioner takes the above definition out of context. Respondent emphasizes that the trial court only listed those crimes that could serve as a precursor to a capital conviction, not the elements of a capital murder charge. For instance, the trial court introduced the discussion above by stating: "We also have the offense of capital murder. Not all murders are capital murders. The legislature, again, under the Penal Code has set out only certain instances when murder becomes capital murder. And let me see if I can remember some of those to tell you about. . . ." Tr. Vol. 5 at 23-24. Respondent also highlights that in many cases the trial court provided prospective jurors an accurate definition of the intent required to support a capital murder conviction. Tr. Vol. 5 at 55-56; Vol. 6 at 78-80; Vol. 7 at 73-74; Vol. 9 at 56-60; Vol. 10 at 51-53; and Vol. 16 at 68-69.

The trial court's jury instructions properly informed the jury on the issue of intent. Clerk's Record at 175. Even if the jury misunderstood that the trial court's statements during jury selection authorized a capital murder conviction without a specific intent requirement, immediately before deliberations began the trial court instructed the jury to find that she intentionally killed the victim. The Supreme Court has been "skeptical that, by the time their penalty phase deliberations began, the jurors would have remembered the explanations given during *voir dire*, much less taken them as a binding statement of the law . . . . The comments of the court and counsel during voir dire were surely a distant and convoluted memory by the time the jurors began their deliberations[.]" *Penry v. Johnson*, 532 U.S. 782, 801-02 (2001). Even if the jury misunderstood the trial court's statements during jury selection, the Court presumes that juries will follow their instructions. *See Zafiro v. United States*, 506 U.S. 534, 540 (1993); *Richardson v. Marsh*, 481 U.S. 200, 209 (1987); *Woods v. Johnson*, 75 F.3d 1017, 1036 n. 29 (5th Cir. 1996). Petitioner has given the Court no reason to suppose that the jury ignored its instructions and found that she killed with a mental state that would not support a capital conviction.

2. Definition of "criminal acts of violence"

Under Texas' special issue questions in the punishment phase, a jury must consider "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." TEX. CODE CRIM PRO. art. 37.071 § 2(b)(1). During jury selection, the trial court stated: "'Criminal acts of violence.' You notice that they don't specify particular criminal acts of violence. They just say, 'criminal acts of violence.' If someone walked in right now, slapped me upside the head and caused me pain, that's an assault. That's a criminal act of violence. So it would go from there all the way up to additional murder." Tr. Vol. 5 at 36-37. Petitioner argues that the trial court misstated Texas law by "equat[ing] *any* intentional physical contact with a crime of violence[.]" (Docket Entry No. 1 at 98, 134). Petitioner complains that, since Texas law generally does not elaborate on the special issues, the trial court violated the Constitution by expounding on the terms during jury selection.

The Court of Criminal Appeals has traditionally not required trial courts to define terms such as "criminal acts of violence" in the punishment phase jury instructions. *See Camacho v. State*, 864 S.W.2d 524, 536 (Tex. Crim. App. 1993); *Cantu v. State*, 842 S.W.2d 667, 691 (Tex. Crim. App. 1992). A refusal to define the terms, however, is not the same as finding error if the trial court decides to explain the phrases to the jury. Petitioner has not shown that the trial court's definition was wrong; she only complains that it was given. *See Green v. Johnson*, 160 F.3d 1029, 1038 (5th Cir. 1998) (refusing to grant habeas relief when the petitioner failed to show that the prosecution improperly defined a term from the special issues). Texas' refusal to define the term "criminal acts of violence" insulates the trial court's definition. Petitioner has not shown that a simple assault would not constitute an act of violence under Texas' special issues. Elsewhere, the Court of Criminal Appeals has refused to find automatic error when the trial court attempted to define the otherwise-not defined special issues. *See Jones v. State*, 119 S.W.3d 766, 785 (Tex. Crim. App. 2003). Petitioner cites a case in which the Court of Criminal Appeals found error when the prosecution provided an erroneous definition of "criminal acts of violence" during jury selection, *Coble v. State*, 871 S.W.2d 192, 201 (Tex. Crim. App. 1993), *see also Jackson v. State*, 822 S.W.2d 18, 25 (Tex. Crim. App. 1990), but that case is inapposite to the circumstances before the Court because, unlike that case, the law does not show that the trial court's definition was wrong.

Habeas relief generally lies for errors of federal law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("Mt is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) ("[F]ederal habeas corpus relief does not lie for errors of state law."). Only those state law violations that played a "crucial, critical, and highly significant" role in the trial will offend the due process clause. *Little v. Johnson*, 162 F.3d 855, 862 (5th Cir. 1998). Absent an extreme due process violation, the improper application of state law cannot serve as the basis for habeas relief. Petitioner has not shown that the trial court's explanation of "criminal acts of violence" violated state law, much less that the instruction amounted to a denial of federal due process. Petitioner fails to show that she is entitled to habeas relief on her first claim of trial error.

B. Burden of proof on the mitigation special issue (claim 3(b))

Trial counsel filed two pre-trial motions challenging the statutory provision for the consideration of mitigating evidence. Trial counsel faulted Texas' mitigation special issue because it "fails to assign the State a burden of proof beyond a reasonable doubt on the mitigation issue[.]" Clerk's Record at 87. The trial court summarily denied those motions, Clerk's Record at 81, 89, and gave no instruction that explicitly allocated a burden of proof with respect to mitigating evidence. Petitioner now renews her complaint, arguing that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), requires the prosecution to prove beyond a reasonable doubt that nothing sufficiently mitigates a death sentence.

The state habeas court found that *Apprendi* did not apply to a Texas jury's consideration of mitigating evidence. FFCL at 22-25, ¶¶ 20-27. In *Apprendi*, the Supreme Court found that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Petitioner, in essence, argues that *Apprendi* requires the prosecution to meet the beyond-a-reasonable-doubt standard on any jury issue.

Petitioner's proposed application of *Apprendi* would place an unwieldy and unfounded responsibility on the State. Nothing in Supreme Court precedent requires the prosecution to disprove the existence of mitigating factors. In fact, *Apprendi* jurisprudence intentionally eschews any application to mitigating evidence. Federal law has long recognized "the distinction . . . between facts in aggravation of punishment and facts in mitigation." *Apprendi*, 530 U.S. at 490 n.16; *see also Ring v. Arizona*, *536* U.S. 584, 597 n.4 (noting that the defendant in that case made "no Sixth Amendment claim with respect to mitigating circumstances"). On that basis, the Fifth Circuit has rejected similar claims and found that "[n]o Supreme Court or Circuit precedent constitutionally requires that Texas's mitigation special issue be assigned a burden of proof." *Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir. 2005); *see also Coleman v. Quarterman*, 456

F.3d 537, 542 (5th Cir. 2006); *Anderson v. Quarterman*, 204 F. App'x. 402, 409 (5th Cir. 2006). In application, "a state death penalty statute may place the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances." *Kansas v. Marsh*, 548 U.S. 163, 173 (2006). This Court could only rule otherwise by creating a new rule of constitutional law in violation of *Teague v. Lane*, 489 U.S. 288 (1989). *See Rowell*, 398 F.3d at 378

Petitioner "recognizes that this issue may be foreclosed by 5th Circuit precedent." (Docket Entry No. 1 at 140). Petitioner has not shown that the state court decision was contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

C. Admission of Petitioner's Statements (claim 3(c))

At trial, the prosecution called Josie Anderson, Marvin Dominique "Junebug" Caston, and Christopher Robinson to describe the events surrounding the victim's kidnapping and death. These witnesses extensively recounted statements Petitioner made during the course of the crime. Petitioner claims that they repeatedly conveyed inadmissible hearsay. Petitioner argues that the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), made such testimony inadmissible under the Sixth Amendment's Confrontation Clause.

Because Petitioner did not raise a *Crawford claim* in her initial application or third response, Respondent contends that Petitioner has not exhausted this claim. Petitioner argues that her exhaustion of similar claims suffices to satisfy federal habeas requirements. Because Petitioner's claim is plainly without merit, the Court will address the merits of this issue. *See* 28 U.S.C. § 2254(b)(2).

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford*, the Supreme Court revamped its prior Confrontation Clause jurisprudence and held that "[t]estimonial statements of witnesses absent from trial" are generally admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine [the witness]." 541 U.S. at 59. A testimonial statement "is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact' and includes "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' *Id.* at 51-52. While not explicitly listing all categories of statements that may be testimonial, the *Crawford* court observed that "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records or statements in furtherance of a conspiracy." *Id.* at 56; *see also United States v. Robinson*, 367 F.3d 278, 292 n. 20 (5th Cir. 2004) (recognizing that statements made during the course of a conspiracy are non-testimonial in nature).

The statements Petitioner complains about were her own. "[N]o clear authority exists for the proposition that the Sixth Amendment guarantees a right to 'confront oneself' at trial." *Torres v. Roberts*, 253 F. App'x 783, 787 (10th Cir. 2007); *see also Crawford*, 541 U.S. at 51 (stating that the Confrontation Clause applies to "witnesses against the accused"); 4 Jack B. Weinstein & Margaret A. Berger, WEINSSTEIN'S FEDERAL

EVIDENCE § 802.05(3)(d) at 802-25 (2d ed. 2005) (explaining "a party cannot seriously claim that his or her own statement should be excluded because it was not made under oath or subject to cross-examination"). Under traditional evidentiary principles, statements made by a party/opponent – such as Petitioner's comments to her co-perpetrators – are not hearsay. *See* TEX. R. EVID. 801(e)(2)(A). Further, statements made to co-conspirators that furthered their conspiracy to commit kidnapping and murder are not "testimonial" in nature, but fall within a well-established exception to hearsay rules. *See Robinson*, 367 F.3d at 292 (finding that statements made in the course of a conspiracy are non-testimonial under *Crawford)*. The core concerns of *Crawford* were not existent in this case because Petitioner was in the courtroom and could explain the challenged statements. Petitioner has not shown that *Crawford* or its progeny excludes her statements from coming before the jury.

Petitioner has not shown that the trial court's actions violated her constitutional rights. The Court will deny claims 3(a), (b), and (c).

II. Prosecutorial Misconduct (claim 5)

Petitioner alleges that the prosecution engaged in misconduct that violated her constitutional rights. Petitioner alleges that the prosecution violated her rights by: (a) not informing Jose Corona of his right to spousal immunity; (b) misstating the law regarding accomplice witness testimony; and (c) colluding with trial counsel to produce an affidavit on state habeas review. Petitioner did not exhaust these claims is state court. "Prosecutorial misconduct is not a ground for relief unless it casts serious doubt upon the correctness of the jury's verdict." *Styron v. Johnson*, 262 F.3d 438, 449 (5th Cir. 2001). "[T]he appropriate standard of review for [a prosecutorial misconduct] claim on writ of habeas corpus is the narrow one of due process, and not the broad exercise of supervisory power." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quotation marks and internal citations omitted). A prosecutorial misconduct claim requires a court to consider three factors: "1) the magnitude of the prejudicial effect of the [prosecutorial action]; 2) the efficacy of any cautionary instruction given by the judge; and 3) the strength of the evidence supporting the conviction." *Styron*, 262 F.3d at 449. "Only where improper prosecutorial [actions] substantially affect the defendant's right to a fair trial do they require reversal." *Id.*

A. Not Informing a Witness about Spousal Immunity (claim 5(a))

Petitioner claims that the prosecution engaged in misconduct by not informing Petitioner's boyfriend/husband Corona that he could exert a martial privilege against testifying. Petitioner argues that her relationship with Corona qualified under Texas law as a common-law marriage. Accordingly, Petitioner claims that, had he known of the testimonial privilege associated with that relationship, Corona would not have testified against her. On federal review, Petitioner has presented an affidavit from Corona where he affirms that no one told him that he could avoid testifying. (Docket Entry No. 1, Exhibit 2). Petitioner claims that due process guarantees obligated the prosecution to inform Corona that he could exert the marital testimonial exemption.

As the Court will discuss further in the related ineffective-assistance-of-counsel claim, the record supporting Petitioner and Corona's alleged common-law marriage is mixed at best. Even assuming that Petitioner and Corona's relationship qualified as a common-law marriage, Petitioner has not shown that the prosecution has an affirmative duty to ensure that its witnesses know of possible testimonial privileges. This Court asked the parties to brief the question of whether Texas law places an affirmative burden on the prosecution to inform its witnesses of spousal immunity. Petitioner responded that "Texas law . . . does not indicate whether the prosecution in a criminal case has the duty to inform a witness of a potential testimonial privilege." (Docket Entry No. 32 at 44). Nevertheless, Petitioner contends that in the case where defense counsel has "shirked their responsibility to provide an effective and zealous defense" by not informing a witness of that privilege, "the prosecution has some higher, if not legal, duty." (Docket Entry No. 32 at 44). Petitioner then goes on to argue that the prosecution must not "exploit defense counsel's lack of preparation and utter ineptitude to its advantage." (Docket Entry No. 32 at 45).

The marital exemption from testifying does not find its root in the Constitution but in public policy and statutory law. "[T]he marital privilege has never been placed on a constitutional footing. While its origins are somewhat obscure, we know that the marital privilege is bequeathed to us by the long evolution of the common law, not by constitutional adjudication." *Port v. Heard*, 764 F.2d 423, 430 (5th Cir. 1985); *see also Heiselbetz v. Johnson*, 190 F.3d 538, 1999 WL 642862, *6 (5th Cir. 1999) (unpublished) (finding "no Supreme Court precedent clearly establishing that a wife's testimony against her husband violates the Fourteenth Amendment"). However strong policy arguments may be for rigorously protecting the martial exemption, Petitioner does not provide the Court with any law obligating the prosecution to inform its witnesses of testimonial privilege or refrain from presenting testimony absent an explicit waiver of that privilege.

Additionally, for reasons discussed later, even assuming that the prosecution should not have called Corona *as a* witness, the inclusion of his testimony does not call into doubt the integrity of Petitioner's conviction or sentence. Petitioner has not shown that the prosecutor engaged in misconduct by calling Corona as a witness.

B. Accomplice-Witness Testimony claim 5(b))

Texas law requires the corroboration of testimony by accomplices: "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense." TEX. CODE CRIM. PRO. art. 38.14. Petitioner alleges that the prosecution misstated Texas law concerning accomplice testimony during closing argument.

The prosecution's closing discussed the role Josie Anderson, Marvin Dominique "Junebug" Caston, and Zebediah "Zeb" Combs played in the crime. The prosecution insisted that those three individuals were not parties to the offense:

> The law of the parties, it excludes to some extent June – Josie and Zeb, Junebug: Those three people admittedly came and did the first night. Y'all heard about what they did and their conduct. Zeb was always present on Van Zandt Street, and you know that. But what did they actually do on the night of the abduction? You know Junebug and Josie weren't there. Everybody told you they weren't there. So they didn't do anything. If you think they may have been a party, they may have been a party to the conspiracy at the discussion of it, but they

> weren't a party to the actual capital murder and kidnapping murder. That didn't happen. They weren't parties to that . . . .

Tr. Vol. 24 at 110-11. Petitioner contends that the prosecution then misstated the law concerning accomplice witness testimony:

> *Our position to you is that they are not parties to this offense.* Why is this important? Why is this important? Accomplice witness. If you go down a little bit later on, it talks about the accomplice witness testimony. And remember what Judge Shaver told you, what we all told you about, you have got to corroborate. Corroborate does not mean, does not mean that you must believe beyond a reasonable doubt that all the other evidence, if you throw out all the other witnesses, proves that she committed the crime. *Corroboration merely tells you, you must believe that the offense was committed and that the conduct you heard about is true and the other facts support that the offense of capital murder occurred.* And if you do that, if you find those things, it could be one piece of evidence or multiple pieces of evidence, then that is sufficient to corroborate any accomplice witness that you find.
>
> . . .
>
> *Our position still goes back Junebug and Zeb, as well as Josie, they are not accomplice witnesses. They did not participate on the night of the actual offense or the killing of Joana Rodriguez*

> *or the kidnapping of the baby* . . . . These three people were not indicted on any charge of this crime. So if you believe that they are accomplices as a matter of fact, then you must look for corroboration.

Tr. Vol. 24 at 111-12 (emphasis added).

Petitioner alleges that the prosecution made two incorrect statements. First, Petitioner objects to the statement: "[t]his argument that Anderson, Caston, and Combs – three individuals who admitted their involvement in the underlying crime . . . – could not be accomplices because they were not present during the kidnapping is a misstatement of Texas law." (Docket Entry No. 1 at 146). Petitioner contends that a person can be an accomplice without being present at the crime. Second, Petitioner argues that the prosecution's explanation of corroboration was insufficient because it only required a showing that the offense occurred without connecting the defendant to the crime. *See* TEX. CODE CRIM. PRO. art 38.14 ("A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.").

Petitioner did not object at trial to the prosecution's comments. Because Petitioner failed to exhaust this claim properly, she prevented the state courts from determining whether Texas' contemporaneous objection rule bars these post *facto* objections. By not objecting at trial, Petitioner prevented the prosecution from rectifying any legal error and the trial court from issuing a cautionary instruction. *See Barrientes v. Johnson*, 221 F.3d 741, 779 (5th Cir. 2000) ("The well-settled rule in Texas appears to be that, unless the arguments of the prosecutor are so prejudicial that no instruction could cure the harm, the failure to timely object waives any error.") (quotation omitted); ***Muniz v.Johnson***, 132 F.3d 214, 221 (5th Cir. 1998) ("The Texas courts require a defendant to raise a contemporaneous objection to a prosecutor's improper closing arguments. The rationale for the contemporaneous objection rule is that it conserves judicial resources. A contemporaneous objection allows the trial court to correct the error at the time it occurs, or to grant a new trial.").

Most important, Petitioner has not shown that habeas relief is required even if the prosecutor misstated Texas law. "For prosecutorial misconduct to warrant a new trial, it must be so pronounced and persistent that it permeates the entire atmosphere of the trial, . . . and casts serious doubt upon the correctness of the jury's verdict." *United States v. Wallace*, 32 F.3d 921, 926 (5th Cir. 1994) (quotation omitted). Here, the trial court issued explicit and detailed instructions respecting accomplice-witness testimony. Clerk's Record at 178-79. Petitioner does not argue that the trial court's instructions misstated the law. Reviewing courts "presume that the jury follows the instructions of the trial court unless there is an overwhelming probability that the jury will be unable to follow the instruction and there is a strong probability that the effect [of the prosecutorial misconduct] is devastating." *United States v. Tomblin*, 46 F.3d 1369, 1390 (5th Cir. 1995); *see also United States v. Wyly*, 193 F.3d 289, 299 (5th Cir. 1999).

Even if the prosecutor did not define the law of accomplices correctly, "[t]he arguments of counsel perforce do not have the same force as an instruction from the court. Here, where the prosecutor's reference. . . was cursory, there is no reasonable likelihood that the jury disregarded or misconstrued the court's specific instructions." *Ward v. Whitley*, 21 F.3d 1355, 1366 (5th Cir. 1994). The facts of this case make it unlikely that the jury misapplied the law. The complained-of witnesses were not accomplices to the kidnapping and murder because they did not "participate[] before, during, or after the commission of the crime and [could not] be prosecuted for the same offense as the defendant or for a lesser-included offense." *Medina v. State*, 7 S.W.3d 633, 641 (Tex. Crim. App. 1999). The trial court properly defined the term "accomplice" and provided for witnesses to fall within that category "whether or not they were present and participated in the commission of the crime." Clerk's Record at 178. The jury instructions also specified that accomplice witness testimony must not "merely show[] the commission of the offense," but also "tend to connect the defendant with its commission." Clerk's Record at 178. Petitioner has not shown that the jury would have misapplied the law. Habeas relief on this issue is denied.

C. Collusion with Trial Counsel (claim 5(c))

Petitioner claims that the State violated her rights by securing an affidavit from her trial attorneys on state habeas review. As early as 1888, the Supreme Court recognized that once a client has voluntarily waived the attorney/client privilege, "it cannot be insisted on to close the mouth of the attorney." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). The *Strickland* inquiry presupposes that trial attorneys will respond to accusations of ineffective assistance and outline what they did to represent their clients. *See Strickland v. Washington*, 466 U.S. 668, 69 (1984) ("[I]nquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions."). "By alleging that his attorneys provided ineffective assistance of counsel in their choice of a defense strategy, [an inmate] put[s] at issue – and thereby [has] waived – any privilege that might apply to the contents of his conversations with those attorneys to the extent those conversations bore on his attorneys' strategic choices." *Johnson v. Alabama*, 256 F.3d 1156, 1178 (11th Cir. 2001); *see also In re Lott*, 424 F.3d 446, 452-53 (6th Cir. 2005) ("The [attorney-client] privilege may be implicitly waived by claiming ineffective assistance of counsel or by otherwise raising issues regarding counsel's performance"); *Bittaker v. Woodford*, 331 F.3d 715, 718-19 (9th Cir. 2003) (noting "[t]he rule that a litigant waives the attorney-client privilege by putting the lawyer's performance at issue"); *Wharton v. Calderon*, 127 F.3d 1201, 1203 (9th Cir. 1997) (waiver extends to communications at issue in ineffective assistance claims); *Crutchfield v. Wainwright*, 803 F.2d 1103, 1121 (11th Cir. 1986) ("Although the attorney-client privilege, in particular, and attorney-client confidentiality, in general, are important concerns due genuine deference, courts have never treated them *as* inviolable. When a defendant has challenged his conviction by asserting an issue that makes privileged communications relevant, he waives the privilege in respect to those communications."); *Tasby v. United States*, 504 F .2d 332, 336 (8th Cir. 1974) (client expressly or impliedly waives attorney-client privilege when "attack by the client upon his attorney's conduct . . . calls into question the substance of their communications").

The informal waiver of attorney/client privilege has become so axiomatic in the Fifth Circuit that it applies "the old aphorism that 'no man can have his cake and eat it too.'" *United States v. Woodall*, 438 F.2d 1317, 1326 (5th Cir. 1971). The Fifth Circuit has unambiguously held that "[a] lawyer may reveal otherwise privileged communications from his clients in order to recover a fee due him, or to defend himself against charges of improper conduct, without violating the ethical rules of confidentiality or the attorney-client privilege." *United States Ballard*, 779 F.2d 287, 292 (5th Cir. 1986) (footnotes omitted); *see also Doe v. A Corp.*, 709 F.2d 1043, 1048-49 (5th Cir. 1983) ("It would be a manifest injustice to allow the client to take advantage of the rule of exclusion as to professional confidence to the prejudice of his attorney, or that it should be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights."). Simply, "the privilege is not an inviolable seal upon the attorney's lips. It may be waived by the client; and where, as here, the client alleges a breach of duty to him by the attorney, [federal courts] have not the slightest scruple about deciding that he thereby waives the privilege as to all communications relevant to that issue." *Laughner v. United States*, 373 F.2d 326, 327 (5th Cir. 1967).

The fact that the prosecution facilitated trial counsel's affidavit poses no constitutional concern. Importantly, because the State's actions on habeas review are unrelated to the integrity of Petitioner's underlying conviction and sentence, this argument cannot serve as the basis for habeas relief. *See Brown v. Dretke*, 419 F.3d 365, 378 (5th Cir. 2005) ("[A]lleged infirmities in state habeas proceedings are not grounds for federal habeas relief."). The Court summarily denies this claim.

III. Right to Consular Assistance under the Vienna Convention (claim 2)

Petitioner faults the trial court, the prosecution, and her trial counsel for not informing her of the right to consular assistance. In state court, Petitioner only properly exhausted a claim that her trial counsel failed to protect her Vienna Convention rights. As a citizen of St. Kitts, Petitioner's arrest triggered a right to consular assistance under the Vienna Convention on Consular Relations ("Vienna Convention"), Apr. 24, 1963, [1970] 21 U.S.T. 77, T.I.A.S. No. 6820. St. Kitts belongs to the British Commonwealth, giving Petitioner British citizenship. The Vienna Convention "provides that if a person detained by a foreign country so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State of such detention, and inform the detainee of his right to request assistance from the consul of his own state." *Medellin v. Texas*, ___ U.S. ___, 128 S. Ct. 1346, 1353 (2008) (quotation omitted). "In other words, when a national of one country is detained by authorities in another, the authorities must notify the consular officers of the detainee's home country if the detainee so requests." *Sanchez-Llamas v. Oregon*, ___ U.S. ___, 126 S. Ct. 2669, 2675 (2006). Petitioner argues that "the only burden that [the Vienna Convention] placed on the State was to inform Carty of her rights to consular assistance, a burden that is incredibly light and could easily have been met." (Docket Entry No. 23 at 82). Petitioner alleges that:

> At the time that I was taken into custody by the police, I was not informed that I had a right to contact the Consulate of St. Kitts or the United Kingdom. . . . Had I known of my right to consular assistance, I would have invoked it an refused to speak to anyone until I was in contact with my consulate. . . . At no time during my detention or trial was I informed of my right to consular assistance. If I would have known of my right, I would have willingly accepted the assistance.

(Docket Entry No. 1, Exhibit 5, Affidavit of Linda Carty dated 22 October 2004).

The writ of habeas corpus is only available when a petitioner shows that the state court judgment was "contrary to, or involved an unreasonable application of, *clearly established Federal law, as determined by the Supreme Court of the United States[.]"* 28 U.S.C. § 2254(d)(1)(emphasis added). The Supreme Court has, to date, found "it unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights." *Sanchez-Llamas,* ___U.S. at ___, 126 S. Ct. at 2677; *see also Medellin,* ___U.S. at ___, 128 S. Ct. at 1357 n.4 (finding it " unnecessary to resolve whether the Vienna Convention is itself 'self-executing' or whether it grants Medellin individually enforceable rights"); *Breard v. Greene,* 523 U.S. 371, 376 (1998) (stating that the Vienna Convention "arguably confers on an individual the right to consular assistance following arrest" but leaving the resolution of that issue to the lower courts).

No Supreme Court precedent provides for relief on Petitioner's Vienna Convention claim. In the absence of contrary Supreme Court authority, Fifth Circuit precedent binds this Court's analysis. Because the preamble to the Vienna Convention explains that it is "not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States," the Fifth Circuit has "held that Article 36 of the Vienna Convention does not create an individually enforceable right." *Medellin v. Dretke,* 371 F.3d 270, 280 (5th Cir. 2004); *see also United States v. Jimenez-Nava,* 243 F.3d 192, 198 (5th Cir. 2001) ("The sum of Jimenez-Nava's arguments fails to lead to an ineluctable conclusion that Article 36 creates judicially enforceable rights of consultation between a detained foreign national and his consular office. Thus, the presumption against such rights ought to be conclusive."). Petitioner has not shown that the Vienna Convention creates a right that can form the basis for habeas relief.

Even assuming that the Vienna Convention creates an individually enforceable right, Petitioner has not shown that Texas impaired her ability to avail herself of international obligations. While the record suggests that no one informed Petitioner of her right to consular assistance when first arrested, it contradicts Petitioner's assertion that she was never informed of that right. The police arrested Petitioner on May 16, 2001. The next day a magistrate informed Petitioner of her rights. Petitioner was given a form to sign that allowed her to declare her foreign citizenship and avail herself of the Vienna Convention protections. Petitioner was given a form that stating that, if she were a foreign national, she was "entitled to have [the State] notify [her] county's consular representatives[.]" Clerk's Record at 3. Petitioner claimed to be a United States citizen. Clerk's Record at 3. Petitioner signed the document and affirmed that she understood its contents. Again on May 21, a state magistrate judge warned Petitioner: "If you are not a citizen of the United States, you may have the right to contact your consulate. If you are a foreign national of certain countries, you have the right to have your consulate contacted for you." Clerk's Record at 3. Petitioner signed the warning. The bottom of the warnings bears the notation: "per [defendant] she is a U.S. citizen." Clerk's Record at 4.

The state habeas court found that Petitioner "was given statutory warnings on two occasions by two different judges; that [Petitioner] informed both judges that she was a United States citizen; that one judge noted 'per defendant: she is a U.S. citizen'; and that [Petitioner] told trial counsel that she was a United States citizen born in St. Kitts." State Habeas Record at 779-80,' 42. Petitioner now states that "During my processing I was handed a stack of papers to sign, but I did not read these, and I did not check a box to indicate I was a United States citizen." (Docket Entry No. 1, Exhibit 5, Affidavit of Linda Carty dated 22 October 2004). This statement, however, does not contradict the state habeas court's finding that she told judges that she was a U.S. citizen. Petitioner has not shown that Texas did not comply with is "incredibly light" burden to tell her about the Vienna Convention rights. Petitioner chose to lie about her citizenship. Petitioner has not shown that the State bore any additional obligation once Petitioner waived her right to consular assistance by her assertion that she was a United States citizen.

Even after the State of Texas complied with its obligation under the Vienna Convention, the record contains contradictory statements by Petitioner concerning her citizenship. As previously noted, Petitioner twice affirmed before a state magistrate that she was a United States citizen. In a competency evaluation performed by Dr. Edward P. Friedman on June 27, 2001, Petitioner stated that she was born in the United States Virgin Islands. Clerk's Record at 26. Until just before trial, Petitioner consistently said that she was not a foreign national. In a December 20, 2001, examination, however, Petitioner told Dr. Jerome B. Brown that she was born in St. Kitts. Tr. Vol. 28, Defense's Exhibit 1. However, had Petitioner wished to avail herself of international treaties, she should not have lied about her citizenship to the state actors.

Petitioner argues that her trial counsel, the prosecution, and the trial court had constructive knowledge of her true citizenship. First, she argues that her DEA files indicated that she was a British citizen born in St. Kitts, "a fact known to the government since at least 1991." (Docket Entry No. 1 at 115). The State of Texas, not the DEA, prosecuted Petitioner for capital murder. Petitioner shows no authority for attributing facts known to federal agencies to state prosecutors. Second, Petitioner refers to the records of her 1993 auto theft arrest as showing her citizenship status as being a resident alien. Petitioner, however, assumes that this overcomes her declaration that she was a United States citizen. That reasoning presupposes that the government bears an affirmative duty to investigate a defendant's citizenship notwithstanding their professed nationality. Petitioner has not shown that such an obligation exists. Third, Petitioner contends that her "accent should at least have put the State on notice of her possible foreign citizenship." (Docket Entry No. 1 at 117). Petitioner assumes that perceptible features such as accent, and by extension race, require the government to assume a duty to investigate citizenship. Petitioner, however, does not show that the law places such a requirement on the States. Petitioner has not shown that the State did not protect her rights to the extent that they were aware of them and that her lack of forthrightness did not hamper her identification as a foreign national.

Even if Petitioner could show a Vienna Clause violation, the federal courts have not yet created a remedy for that encroachment. The Vienna Convention itself does not articulate a specific remedy for its violation. *See Jimenez-Nava*, 243 F.3d at 199. The Supreme Court has suggested that a petitioner would need to show more than speculative harm flowing from any Vienna Convention violation, specifically when "provided with effective legal representation[.]" *Medellin v. Dretke*, 544 U.S. 660, 665 (2005). The Supreme Court in *Sanchez-*

Llamas found that suppression was not a proper remedy. While Petitioner asks this Court to void her conviction and sentence because of a Vienna Convention violation, no Supreme Court or Fifth Circuit precedent requires that result. Here, the state habeas court found that Petitioner "fail[ed] to show harm based on any lack of notification to the British consulate concerning her arrest for capital murder; [Petitioner] was provided with effective legal representation upon [her] request, and [her] constitutional rights were safeguarded." State Habeas Record at 790, ¶15. As no clearly established federal law requires relief on this claim, this Court cannot decide whether more drastic remedies such as removal of the death penalty as a sentencing option or reversal of a conviction are theoretically appropriate remedies. For those reasons, Petitioner has not shown an entitlement to federal habeas relief under the Vienna Convention.

IV. Insufficiency of the Evidence (claim 4)

Petitioner argues that, "[e]ven accepting all of the evidence as true, there is insufficient evidence to establish that Carty *intended to kill* Joana Rodriguez." (Docket Entry No. 1 at 143). In determining the sufficiency of the evidence, this Court asks "whether after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Petitioner largely exhausted this claim in state court through (1) her appellate challenge to the sufficiency of accomplice-witness testimony and (2) her habeas allegation that appellate counsel should have advanced an insufficiency-of-the-evidence claim. The state habeas court found that a sufficiency-of-the-evidence claim was meritless. FFCL, at 21-22, ¶¶ 7-18.

Jackson's forgiving inquiry thus merges with the AEDPA's standards into a doubly deferential standard. *See Garcia v. Carey*, 395 F.3d 1099, 1103 (9th Cir. 2005) (noting that the AEDPA "adds a second level of deference" to the *Jackson* standard); *Torres v. Mullin*, 317 F.3d 1145, 1151 (10th Cir. 2003) ("[The] AEDPA ha[s] added an additional degree of deference to state courts' resolution of sufficiency of the evidence questions.").

Petitioner claims that the evidence insufficiently showed her intent to kill. Petitioner argues that "the prosecution never established a direct intent to kill, but rather attempted to establish the requisite intent through what was a logical assumption, i.e., Carty wanted to cut a baby out of Rodriguiez and that this would necessarily kill Rodriguez in the process." (Docket Entry No. 1 at 144). The prosecution based this argument on: (1) Petitioner's repeated statements that she wanted to cut the baby from the victim and (2) the fact that she bought surgical scissors before the murder. Petitioner claims that she could not have had the requisite intent to kill under that theory, primarily because the blunt-nosed scissors could not pierce flesh and the victim had already given birth when she was abducted. Thus, Petitioner argues, the prosecution tried to show her intent through an impossible set of inferences, basing her conviction on insufficient evidence.

The issue before the Court is not whether Petitioner could have killed the victim by cutting a baby from her with bandage scissors. Obviously, the victim did not die in that manner. No rational juror could have convicted Petitioner of killing the victim with bandage scissors because the victim suffocated. True, Petitioner repeatedly told her co-conspirators that she wanted to cut the baby from the victim. Those statements did not directly show intent, particularly because that is not how Petitioner "cause[d] the death," but circumstantially show that Petitioner anticipated committing homicide.

The probative value in the State's reliance on Petitioner's barbarous statements and her possession of the scissors was the inference that Petitioner wanted to kill. That murderous desire, however, exists apart from the objective reality of whether she could carry out her plans. The value in the statements was the subjective indication of what Petitioner was thinking as she gathered about her people who would help her kidnap and kill.

Texas law premises a murder conviction on whether the actor "intentionally or knowingly causes the death of an individual." TEX. PENAL CODE § 19.02(a)(1). Texas law defines "intent" as "conscious desire to engage in the conduct or cause the result." TEX. PENAL CODE § 6.03(3). "That is, [the defendant] must have intended or known that [her] victim would die." *Moreno v. Dretke*, 450 F.3d 158, 172 (5th Cir. 2006). Moreover, the jury instructions here allowed for Petitioner's conviction as a party even if she did not personally kill the victim if she aided in or encouraged the crime. Clerk's Record at 176-78.

The testimony and argument relating to Petitioner's statements that she wanted to cut the baby out of the victim exist as circumstantial support to the inferences springing from what she meant to do when putting the victim in a trunk and placing a plastic bag over her head. As the prosecution argued, "Intentional? You bet it was, ladies and gentlemen. There is nothing more intentional than putting a bag over this lady's head, by having her hands taped, having her legs taped and stuffed in a trunk. . . . Intentional? That's this defendant. Cold? That's this defendant." Tr. Vol. 24 at 153. The prosecution, however, immediately followed that statement by saying: "Asphyxiation. Did she die by suffocation by an unknown manner and means?" Tr. Vol. 24 115. The prosecution then dismissed how the victim probably died. Tr. Vol. 24 at 115-16.

The state habeas court found that "assistant medical examiner Paul Schrode testified that the cause of the [victim's] death was suffocation by homicide; that a plastic bag had been placed over [her] head and then ripped; and, that [her] mouth and underneath her nose was then taped." State Habeas Record at 772, ¶ 9. The state habeas court soundly rejected any argument that "placing a person face down in a car trunk, taping that person's hands, feet, and mouth, and then placing a plastic bag over that person's head are supposedly not actions that show an intent to kill or cause serious bodily injury." State Habeas Record at 774, ¶ 17. The prosecution sought to bolster its case by relying on Petitioner's brutal statements that she wanted the victim dead and accomplished that end either as the principal actor or as a party. The state habeas court's review of the evidence was not unreasonable and showed that Petitioner wanted to kill the victim. The State never relied on those statements as more than showing a violent disposition to kill, not as the manner in which she killed.

Petitioner passingly argues that the evidence to convict her was insufficient because it rested on uncorroborated accomplice testimony. "[T]he Constitution imposes no requirement that the testimony of an accomplice-witness be corroborated by independent evidence." *Brown v. Collins*, 937 F.2d 175, 182 (5th Cir. 1991); *see also Ramirez v. Dretke*, 398 F.3d 691, 695 (5th Cir. 2005) (noting that "the state statutory requirement is [not] derived from federal constitutional principles"). Accordingly, "the prosecution's failure to satisfy the requirements of the accomplice-witness sufficiency rule, and a state court's failure to enforce that purely state rule, simply would not warrant constitutional attention." *Brown*, 937 F.2d at 182. Even if this Court could address that issue, *Jackson* requires the Court to view the evidence most favorably to the State, allowing for the presumption that her accomplices testified truthfully and that adequate evidence corroborated their testimony.

The state habeas court found that the evidence overall was sufficient to support Petitioner's conviction and sentence. Based on the physical evidence and trial testimony, a rational jury could conclude that Petitioner intended to kill the victim. Petitioner's sufficiency-of-the-evidence claim lacks merit.

V. Ineffective Assistance of Counsel (claim 1)

Petitioner raises several complaints about trial counsel's investigation, preparation, presentation, and argumentation at trial. The Court addresses these contentions last as some of the actions of the Court and the prosecution are relevant to the validity of these claims against trial counsel. Petitioner contends that trial counsel:

a. failed to interview Petitioner's boyfriend/common-law husband Jose Corona and inform him that Texas's spousal privilege would allow him to avoid testifying against her;

b. failed to prepare adequately for trial;

c. inadequately prepared an expert witness for trial;

d. failed to prove in the punishment phase that Petitioner would not be a future societal danger;

e. failed to show that Petitioner did not have the specific intent to murder the victim;

f. failed to ask prospective jurors appropriate questions;

g. failed to inform Petitioner of her right to consular access;

h. failed to object to allegedly improper misstatements of the law by the prosecution and trial court;

i. breached a duty owed to Petitioner by providing an affidavit on state habeas review to refute her claims of ineffective assistance;

j. failed to withdraw as counsel of record; and

k. provided cumulatively deficient performance.

As previously noted, Petitioner did not exhaust allegations a, b, d, f, i, and j in her state habeas proceedings.

The Strickland Standard

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Under the *Strickland* standard, a criminal defendant's Sixth Amendment rights are "denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense." *Yarborough v. Gentry*, 540 U.S. 1, 3, (2003); *see also Wiggins v. Smith*, 539 U.S. 510, 520 (2003). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700.

To establish deficient performance, the petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Strickland*, 466 U.S. at 687. The Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct." *Wiggins*, 539 U.S. at 521. Instead, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. In reviewing ineffectiveness claims "judicial scrutiny of counsel's performance must be highly deferential," and every effort must be made to eliminate "the distorting effect of hindsight." *Id. at* 689. An ineffective-assistance claim focuses on "counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct[,]" because "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence[.]" *Id.* at 689-90.

A petitioner must also show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694; *see also Wiggins*, 539 U.S. at 534. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *See Strickland*, 466 U.S. at 689; *Wiggins*, 539 U.S. at 534. The Court does not consider prejudice in a vacuum. "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695.

"It bears repeating that the test for federal habeas purposes is not whether [a petitioner] made that showing [required by *Strickland]*. Instead, the test is whether the state court's decision – that [a petitioner] did not make the *Strickland-showing* – was contrary to, or an unreasonable application of, the standards, provided by the clearly established federal law *(Strickland)*, for succeeding on his [ineffective-assistance] claim." *Schaetzle v. Cockrell*, 343 F.3d 440, 444 (5th Cir. 2003); *see also Busby v. Dretke*, 359 F.3d 708, 717 (5th Cir. 2004) "Of course, in reaching our decision, we must consider the underlying *Strickland* standards." *Schaetzle*, 343 F.3d at 444. As discussed below, Petitioner fails to show that the state habeas court's adjudication of her *Strickland* claims was contrary to, or an unreasonable application of, federal law, *see* 28 U.S.C. § 2254(d)(1), or that she otherwise merits habeas relief.

Petitioner extensively argues that trial counsel's representation fell short of the American Bar Association's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* ("Guidelines"). Recent Supreme Court precedent has relied on the Guidelines as a useful measure of what activities a reasonable attorney should engage in when representing a capital defendant. *See Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins*, 539 U.S. at 524; *see also Strickland*, 466 U.S. at 688-89 ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable"). Nevertheless,

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract

> from the overriding mission of vigorous advocacy of the defendant's cause.

Strickland, 466 U.S. at 688-89. The Supreme Court has not held that the guidelines are a checklist to effective representation. Guidelines established by professional organizations do not supplant, but rather inform, *Strickland's* penetrating performance and prejudice inquiry. *See Wiggins*, 539 U.S. at 521; *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000).

Petitioner's complaints about trial counsel's representation take two separate forms. First, Petitioner makes general complaints about the whole of counsel's representation that, while not serving as grounds for habeas relief, provide context to her habeas claims. For instance, Petitioner complains that trial counsel failed to communicate with her frequently, rushed through jury selection, and ineptly presented her case. Second, Petitioner raises specific complaints as grounds for habeas relief. While only the second category of argument provides an actionable ground for habeas relief, this Court briefly reviews the circumstances of trial counsel's appointment to provide context to her habeas claims.

Background of Petitioner's Ineffective Assistance Claim

The State of Texas charged Petitioner with capital murder on May 17, 2001. Clerk's Record at 2. On May 30, 2001, George J. Parnham filed a notice of appearance, Clerk's Record at 10, though he did not appear at her June 5, 2001, arraignment, Clerk's Record at 9. Petitioner's family raised funds to hire Mr. Parnham. Mr. Parnham appeared on Petitioner's behalf at a June 11, 2001, arraignment. Clerk's Record at 14. Mr. Parnham filed various motions on Petitioner's behalf. On September 18, 2001, Mr. Parnham filed a motion to withdraw because Petitioner was "indigent and unable to employ an attorney of her choosing to represent her" and because he was busy with another high profile case. Clerk's Record at 32-33; *see also* Tr. Vol. 2 at 4. On September 18, 2001, the trial court granted the motion to withdraw.

Petitioner told the trial court that she still wanted to hire an attorney. Because Petitioner could not raise adequate funds, the trial court appointed Jerry Guerinot as counsel of record. Tr. Vol. 2 at 4-5; Clerk's Record at 31. Petitioner did not sign the court pleading authorizing Mr. Guerinot's appointment. Clerk's Record at 31. Petitioner did not allow Mr. Parnham to give trial counsel any documents, records, evidence or material relating to her case until just before trial. Tr. Vol. 17 at 63-65.

The trial court was apparently aware that Petitioner was not assisting her appointed attorneys. On October 4, 2001, the trial court held a hearing in which Petitioner stated that she was still trying to raise enough money to retain counsel. Tr. Vol. 2 at 5. The trial court informed Petitioner that the trial was set for January 7, 2002. The trial court counseled Petitioner as follows:

> Well, I will tell you, once again, this case is set for trial on January 7th. Mr. Guerinot is an excellent, experienced lawyer. He is going to prepare to represent you on that trial. I urge you to cooperate with him, Ms. Carty, because right now he's the only lawyer you have got, and you need to cooperate with him and his investigator to be sure that you have the best possible representation in January when we got to trial on this.

> If you hire a lawyer, fine, they can come in here and ask to substitute in. Just be sure, when you make arrangements to hire another lawyer, that you make them aware when you contract with them that you need somebody who can represent you for your January 7th trial for capital murder.

Tr. Vol. 2 at 5-6.

On October 12, 2001, the State filed its notice of intent to seek the death penalty. Clerk's Record at 35. On October 17, 2001, the trial court appointed Windi Akins as second-chair counsel. Clerk's Record at 36. Petitioner again did not sign the appointment document. Clerk's Record at 36. Throughout October and November, counsel filed numerous motions on Petitioner's behalf, including motions to suppress evidence and a request for investigative services. In a November 19, 2001, hearing in which trial counsel litigated "quite a stack of motions," Petitioner affirmed that she was still looking to retain private counsel. Tr. Vol. 3 at 4. The trial court counseled her:

> I will remind you again, as I have before, be sure that anyone you talk to who you choose to hire and have substitute in is aware that this trial will begin on January 7th. We've had that trial date for some six months now, and it will not be changed due to a delay in your choosing to hire other counsel. Understood?

Tr. Vol. 3 at 6. On November 29, 2001, the trial court approved trial counsel's request for investigative services, though the court only provided $3,000, not the $5,000 requested by counsel. Tr. Vol. 3 at 12-13. The investigator's questionnaire indicates that he asked

Petitioner many of the questions that the defense team should ask under the Guidelines. The record contains the trial investigator's report detailing his efforts. (Docket Entry No. 1, Exhibit 6).

Trial counsel and Petitioner have provided affidavits that provide vastly different views as to the state of the lawyer/client relationship. Mr. Guerinot stated:

> After being appointed on the case, Ms. Carty refused to speak to me or my co-counsel, Windi Akins, because she insisted she was hiring her own lawyer. Ms. Carty did not speak to us about the case from September until the end of jury selection in her case. Ms. Carty was the most uncooperative defendant I have ever represented in a capital murder case. After jury selection was over, Ms. Atkins and I visited Ms. Carty in jail and essentially bribed her with chocolate bars to speak to us about the case. At that time, Ms. Carty told us about the circumstances surrounding her stay at the Hampton Inn Hotel and the items found in her room. Based on that information, we filed a motion to suppress evidence that was recovered in her hotel room and were successful in that motion. Ms. Carty continued to state she was hiring other attorneys and again stopped communicating with us during the trial.

State Habeas Record at 798-99. Throughout his affidavit, Mr. Guerinot complains that Petitioner failed to provide information that would have enhanced the defense's case at trial. For example, Mr. Guerinot complained that Petitioner failed to inform him that she was not a United

States citizen, did not say that she gave birth to a child that was conceived *as a* result of a sexual assault, and that she did not want family members to testify in the punishment phase.

On federal habeas review, Petitioner has provided an affidavit disagreeing with Mr. Guerinot's characterization of their lawyer/client relationship. Petitioner complains that trial counsel failed to request a continuance so that she could secure a private attorney. According to Petitioner, she never spoke with any member of the defense team before December 2001. Petitioner states:

> The first time I spoke to Mr. Guerinot was two weeks before voir dire. He visited me at the Harris County jail with his co-counsel Windi Akins. The visit lasted only about 15 minutes, so I was not able to explain the details of my case to him. Mr. Guerinot told me that he did not have time to prepare for this case because he had been getting ready for his daughter's wedding. Mr. Guerinot also sent his investigator, John Castillo, to meet with me briefly on December 11 and 14, 2001. I feel that there was a complete breakdown in communication, and trial counsel did not adequately prepare to represent me at trial. To my knowledge, Mr. Guerinot and Ms. Akins never sought to withdraw as my defense counsel.

(Docket Entry No. 1, Exhibit 5, Affidavit of Linda Carty dated 22 October 2004).

Petitioner does not describe what interaction she had, if any, with Ms. Atkins. The record contains no statement as to what Ms. Atkins did to prepare for trial. However, both Petitioner and Mr. Guerinot agreed that there was a complete breakdown in the lawyer/client relationship. They differ on who was to blame. Trial counsel faulted Petitioner for belligerence; Petitioner felt that her attorneys were negligent.

Petitioner speculates, based on psychological opinion provided for the first time on federal review, that post-traumatic stress disorder from a rape years before made her uncooperative. (Docket Entry No. 32 at 52, n.18). In her response to the renewed summary judgment motion, Petitioner has submitted an affidavit from Dr. Rahn Kennedy Bailry, a psychiatrist, who recently interviewed her. After his interview, he opened that an abusive relationship, Petitioner's rape, and the subsequent birth left her suffering from Post-Traumatic Stress Disorder. ("PTSD"). (Docket Entry No. 32, Exhibit 12B). Dr Bailey argues that trial counsel should have appreciated Petitioner's PTSD and how it limited her ability to communicate with him. Petitioner does not claim at this late date that counsel should have used this new evidence of PTSD to mitigate against a sentence of death.

The state habeas judge – who presided over trial and presumably could observe Petitioner's interaction with her attorneys – found trial counsel's affidavit credible. The state court found that Petitioner initially "refused to discuss her case with counsel[.]" FFCL, at 2 ¶6. Petitioner engaged in limited communication with counsel "but that [she] subsequently refused to communicate with counsel during trial." FFCL, at 2 ¶7.

At trial, the defense's emphasis was two-fold: (1) undermine the credibility of the State's witnesses, particularly those who testified about Petitioner's role in the murder and (2) show that Petitioner did not have the intent to commit capital murder. To the first point, the defense extensively cross-examined those involved in planning and carrying out the "lick." The defense questioned them repeatedly about prior statements that differed from their trial testimony. The defense also called as witnesses police officers who took the co-perpetrators' initial statements to highlight differences with the trial testimony. Trial counsel's closing argument attacked the credibility of the witnesses.

To the second point, the defense secured a lesser-included-offense instruction for felony murder. Trial counsel tried to shift the emphasis from the actual death to the fact that Petitioner could not cut a baby from the victim: "They want you to believe that, for some reason, that she was going to use a pair, I guess, of blunt-nose nursing scissors to cut a baby out of a woman who already had a baby, which makes absolutely no sense." Tr. Vol. 24 at 126. Trial counsel's argument drilled the insensibility of that theory.

The defense also called three guilt/innocence witnesses. Trial counsel called Houston Police Department Steven R. Straughter to challenge elements of Zeb Comb's statement. The defense also called Petitioner's daughter Jovelle Carty who testified that she thought that her mother had been pregnant and miscarried while living with Corona. Tr. Vol. 24 at 44. The defense called Petitioner's mother as a witness to testify that she did not see Petitioner with baby items before the murder and to otherwise challenge the timeline of events leading up to the killing. Cross-examination revealed that Petitioner never told her mother that she was pregnant. Tr. Vol. 24 at 81-82.

This Court has already reviewed trial counsel's efforts in the punishment phase. With that background, the Court will turn to Petitioner's specific allegations of ineffective assistance.

Analysis of Petitioner's Ineffective Assistance Claim

A. Failure to Inform Corona of Spousal Immunity (claim 1(a))

Petitioner claims that trial counsel provided ineffective assistance by not informing Corona that Texas' marital privilege would allow him to avoid testifying against Petitioner. Petitioner asserts that her "claim of ineffective assistance of counsel is based largely on her trial counsel's not interviewing her common law husband, Jose Corona." (Docket Entry No. 32 at 42). Petitioner argues that, had trial counsel interviewed Corona and informed him of his right not to testify against Petitioner, none of the following testimony would have been before the jury:

- While they were living together, Petitioner repeatedly told Corona that she was pregnant, but she never had a baby.
- Petitioner wanted to have children and bought baby items.
- Corona left her because of her lies about being pregnant.
- After Corona moved out, Petitioner told him she was pregnant so that he would return.
- On May 15 and 16, 2001, Petitioner told Corona she was pregnant and going to have a baby boy soon.
- Petitioner owned a gun similar to the one found at the Van Zandt address.

(Docket Entry No. 1 at 40). Trial counsel did not interview Corona before trial, though he assumed that his investigator spoke with him. Petitioner argues that trial counsel had a duty to inform Corona that, pursuant to Texas' spousal immunity, he did not have to testify at trial.

Petitioner did not properly exhaust this claim. Nonetheless, the Court finds that trial counsel's failure to prevent Corona's testimony by informing him of the marital privilege did not violate *Strickland's* principles.

1. Existence of a valid common law marriage

Texas law provides: "In a criminal case, the spouse of the accused has a privilege not to be called as a witness for the state. This rule does not prohibit the spouse from testifying voluntarily for the state, even over objection by the accused." TEXAS RULES OF EVIDENCE, Rule 504(b)(1). The law recognizes that "[t]he basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails." *Wolfle v. United States*, 291 U.S. 7, 14 (1934). Corona and Petitioner never officially married. Texas' spousal privilege, however, extends to common-law marriages. Petitioner argues that she and Corona had a common-law marriage, thus allowing him to exert the marital privilege. Petitioner faults trial counsel for not informing Corona that he did not have to testify.

Serious questions accompany this claim. Previously under Texas law, a criminal defendant could invoke the disqualification of his spouse as a witness under former article 38.11 of the Code of Criminal Procedure. *See Benitez v. State*, 5 S.W.3d 915, 918 (Tex. App.-Amarillo 1999, pet red). Since 1986, however, only the witness can exert the privilege. Tex. R. Evid. 504(b)(1). The rule does not prohibit the spouse of the accused from testifying voluntarily for the State even over objection from the accused. Tex. R. Evid. 504(b)(1). Petitioner's claim, therefore, is that trial counsel could have encouraged Corona not to testify. At least one circuit has called this theory of ineffective assistance "novel." *United States v. McLean*, 138 F.3d 1398, 1406 (11th Cir. 1998).

Respondent contends that Petitioner and Corona did not meet the standards required to establish a common-law marriage. Under TEXAS FAMILY CODE § 2.401(a)(2), Texas recognizes a common-law marriage when "the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and there represented to others that they were married." Essentially, common-law marriage has three requirements: (1) the parties agree to be married; (2) the parties live together as spouses after they agree to be married; and (3) the parties represent to others that they are married.

The record contains varied indications of whether Corona and Petitioner had a common-marriage. Nothing the in record before trial concretely shows that the parties or the trial court would know that a common-law relationship existed. On May 16, 2001, Corona made a statement to the police wherein he described Petitioner's acts on the days before the murder and how she repeatedly claimed to be pregnant. Corona did not identify Petitioner as his wife. In fact, he told the police that he had never been married and gave no indication that he considered himself married to Petitioner. Corona specifically told the police "When I met Linda I was living at 10330 Westview #38. I lived there alone. *I have never been married. Linda was the first woman I have ever lived with.*" In a competency evaluation, while Petitioner told a psychologist that "she has been in a common-law relationship with a man for over three years," she refuted any suggestion that the relationship amounted to a marriage when she stated that "they were planning on marrying this year 'until all this happened.'" Clerk's Record at 26.

During a pre-trial suppression hearing, however, trial counsel repeatedly referred to Corona as Petitioner's husband. Petitioner used the past tense to describe her relationship with Corona to the trial investigator. ("I had a common law relationship . . . "). (Docket Entry No. 1, Exhibit 6). The defense investigator's report states that "[d]efendant claims to be in a common law relationship with a Hispanic male identified as Jose Corona." On a "client background information form," she stated that she "had a common law relationship with Jose Corona. It was a solid emotional one (lots of love). But [her] husband was an alcoholic and couldn't admit it." She listed her relationship with Corona as "husband/companion." The investigator's notes record Corona as being her husband. A pretrial services form, however, showed that she had reported her martial status as "sig," indicating single. (Docket Entry No. 1, Exhibit 6).

Trial provided little clarity as to the status of their relationship. At trial, Corona described his relationship with Petitioner as follows:

The State: Did she move in with you?

Corona: Yes.

The State: Did y'all start becoming boyfriend and girlfriend in that time?

Corona: More or less, yes.

The State: Well, tell us what your relationship was like with Linda when she moved in with you?

Corona: As a couple.

The State: Did you tell people that she was your wife?

Corona: Yes.

The State: Do you know whether she told people you were her husband, or do you know?

Corona: I don't know.

The State: Eventually did she move all her stuff into your apartment?

Corona: Yes.

The State: How long did you and Linda live together?

Corona: Two-and-a-half years or three. I'm not sure. I'm not very sure.

Tr. Vol. 20 at 189-90. On cross-examination, however, Corona said that he "wasn't married to her." Tr. Vol. 20 at 214-15. Nothing in the record suggests that Corona considered himself married to Petitioner after he moved out in early May 2001. Corona testified at trial that he moved out of their apartment at the beginning of May 2001 because he was "tired of her lies." Tr. Vol. 20 at 205. Corona also told Petitioner that he no longer loved her. After that point Petitioner again told him she was pregnant, but he did not believe her. Petitioner called Corona repeatedly after he left and begged him to come back. Corona's trial testimony distinctly indicated that his relationship with Petitioner had ended.

Some witnesses testified that Petitioner called Corona her husband, others said she called him her boyfriend. At least one witness knew Petitioner as "Linda Corona." Most witnesses referred to Corona as Petitioner's husband. *See, e.g.*, Tr. Vol. 20 at 11, 142-43, 147, 150-51, 164, 175, 177; Vol. 21 at 79-80, 102, 104, 221-22; Vol. 22 at 16-61; Vol. 23 at 56, 70; Vol. 24 at 87. Some called him her fiancé. Tr. Vol. 21 at 43, 57. Some called him her "husband . . . or her boyfriend." Tr. Vol. 21 at 109. At one point, trial counsel called Corona her "common law husband." Tr. Vol. 25 at 140. Petitioner's daughter, however, said that Petitioner was engaged to Corona. Tr. Vol. 24 at 50, 52.

On state habeas review, Petitioner provided an affidavit from Corona explaining:

> During the time that we lived together, I would introduce [Petitioner] as my wife, and she would introduce me as her husband.
>
> I testified during the guilt portion of [Petitioner's] trial. The prosecution called me to the witness stand during the trial. I did not want to get involved in the trial or to testify against [Petitioner], but when the prosecutor's office called me to testify, I thought that I had to testify and that I had no other choice. Neither Mr. Gerry Guerinot nor Ms. Wendi Atkins talked to me before I testified at [Petitioner's] trial. It was never explained to me before I testified that in Texas there is a martial privilege and that under that privilege I had the right to refuse to testify at [Petitioner's] trial. If [Petitioner's] attorneys had explained to me or informed me about this marital privilege, I would have refused to testify at [Petitioner's] trial unless [her] attorneys had asked me to do so.

(Docket Entry No. 1, Exhibit 2). Corona says that, if given the opportunity to avoid testifying, he would have exerted the martial privilege. Corona's desire not to testify, however, does not mean that the trial court would have found that their relationship was a valid common-law marriage.

Petitioner has filed many affidavits in state and federal court from persons who knew Petitioner. Petitioner's post-trial affidavits give conflicting indications of what relationship existed between herself and Corona. DEA agent Charlie Mathis provided an affidavit in which he indicated that he thought Petitioner and Corona were married. (Docket Entry No. 1, Exhibit 1). Petitioner's daughter has provided an affidavit describing how Petitioner and Corona lived together, but makes no reference to them being married other than to call her mother a "housewife." (Docket Entry No. 1, Exhibit 8). An affidavit from Petitioner's mother does not speak of her being married to Corona. (Docket Entry No. 1, Exhibit 10). Two of Petitioner's affidavits discuss Petitioner and Corona's difficulties in their relationship, but does not address whether she considered them to be married. (Docket Entry No. 1, Exhibit 12, 22). Affidavits from Petitioner's other siblings do not mention Corona, much less comment on the status of their relationship. (Docket Entry No. 1, Exhibits 20, 21, 23, 24, 44). In 2004, Petitioner signed an affidavit but did not comment on her relationship with Corona. (Docket Entry No. 1, Exhibit 5).

Texas law affords the trial court broad discretion in deciding whether a common-law marriage exempts testimony in a criminal case. The Texas courts will "closely scrutinize a claim of common law marriage" and only allow a witness to exert the marital exemption after "a preponderance of the evidence showing that the agreement was to be specific on both sides." *Tompkins v. State*, 774 S.W.2d 195, 208 (Tex. Crim. App. 1987). "In reviewing the issue, testimony of a witness that merely constitutes a conclusion that a common law marriage exists is not sufficient, standing alone, to establish a common law marriage." *Id.* at 209. Because Petitioner did not raise this claim in procedurally adequate manner, the Texas courts did not give a definitive statement of whether Petitioner and Corona had a common-law marriage.

Given the complex and contradictory indicators of what relationship existed between Corona and Petitioner, it is not certain that the trial court would find that they possessed a common-law marriage. This is especially the case because Petitioner has never sought to otherwise authenticate her relationship with Corona. Petitioner never validated her alleged common-law marriage in Texas civil court. The record does not suggest that Petitioner has relied on the existence of the alleged marital state to authenticate property rights, inheritance, or other traditional advantages to the marriage relationship. Petitioner's claim of common-law marriage arose years after the cohabitation ended. The only benefit Petitioner has sought from the alleged marriage is the exclusion of Corona's testimony. There is no indication that, either during the period of their relationship or shortly thereafter, Petitioner considered herself to be in a legally binding relationship with Corona.

Additionally, Petitioner has never sought to terminate her alleged common-law marriage. "[O]nce the common-law status exists, it, like any other marriage, may be terminated only by death or a court decree." *Claveria v. Claveria*, 615 S.W.2d 164, 167 (Tex. 1981). Assuming Petitioner's previous statements to be true, Petitioner *was* not married to Corona or Petitioner *is* married to Corona. Because Petitioner has never sought to divorce Corona, if indeed she had a common-law marriage with Corona, that is still a viable legal relationship. Petitioner, however, now uses the past tense to describe her relationship with Corona. (Docket Entry No. 32 at 38) ("Corona and Carty shared a common law marriage."): Petitioner does not hint that she maintains any current legal relationship with Corona. Corona's statements do not suggest that he still considers himself bound by any legal connection – much less marriage – to Petitioner. From all appearances, Petitioner does not consider that her relationship with Corona survived the end of their cohabitation.

The record is mixed concerning Petitioner's self-serving allegation that a common-law marriage existed. The record does not show that, given the information he had, that trial counsel could have made a plausible argument that would allow Corona to exert his martial privilege. This is particularly the case because, even though Corona now says that he would have used the spousal privilege not to testify, at trial he disclaimed being married to Petitioner. The record is not certain that, being fully informed of Texas law, Corona would not still have said that he "wasn't married to her." Tr. Vol. 20 at 214.-15. He also did not know if Petitioner told people that he was her husband, a requirement under Texas law.

That being said, zealous counsel should have interviewed Corona before trial and provided him the information necessary to try exerting the martial exemption. Nonetheless, even assuming that trial counsel reviewed the evidence and felt that he could make a plausible argument that Petitioner and Corona were married, the mixed record does not suggest that the trial court would have allowed Corona to avoid testifying. The trial court could easily find that Petitioner had not shown compliance with Texas statutory law in establishing an informal marriage. Given the conflicting record, Petitioner has not shown a reasonable probability that the trial court would not have required Corona to testify over Petitioner's objections.

2. Prejudice flowing from Corona's testimony

Most important, Petitioner fails to show a reasonable probability of a different result if trial counsel succeeded in allowing Corona to avoid testifying. The substance of Corona's testimony was that Petitioner repeatedly tried to win his affection by claiming to be pregnant, ultimately committing the crime to validate her story. Petitioner describes this testimony as "Corona was the only person who could testify that he was leaving her because of her lies about being pregnant and about Carty trying to keep him by saying she was pregnant." (Docket Entry No. 1 at 40). Petitioner attached to her third response an affidavit from trial counsel: "There is no doubt in my mind that [Corona's] testimony hurt [Petitioner's] case. I never attempted to inform Jose Corona that he had the right as her husband to not testify." State Habeas Record at 646. An attorney's concession of error does not make it so.

Testimony from Petitioner's boyfriend/husband would be persuasive to the jury. However, Corona was not the only person to testify that Petitioner claimed to be pregnant around the time of the crime. Petitioner alleges that Corona's testimony "paint[ed] the picture of a woman so obsessed with having children that she would do anything to obtain a child." (Docket Entry No. 1 at 41). Petitioner fails to recognize that Corona's testimony, while certainly important, was not the only testimony to link her obsessive desire to have a baby with the crime. In the days leading up to the crime, Petitioner told many people she wanted a baby and would have one in a time frame neatly corresponding to the crime timeline. Other witnesses, and particularly ones not associated with the kidnapping/murder, testified that Petitioner falsely said she was pregnant. For example, both Charlie Mathis and

Sherry Bancroft testified that Petitioner had previously told them she was having a baby when she did not appear pregnant and never gave birth. She informed those involved in the "lick" that she wanted the baby. Their trial testimony in many ways was more damaging than that given by Corona, especially since it made her seem frantic to obtain a child. Removing Corona's testimony that Petitioner would use phantom pregnancy to preserve their relationship would not blunt the testimony that she "needed the baby, needed a baby, needed a baby, needed their baby, that she needed the lady's baby." Tr. Vol. 22 at 21. She even told others that baby Ray was Corona's child. In many aspects, Corona's testimony only corroborated that of many other witnesses.

The most pronounced value in Corona's testimony was not to prove that Petitioner wanted a baby ample testimony revealed that fact. Corona's testimony was the capstone to show *why* she wanted a baby: to win back her boyfriend/husband to whom she had repeatedly lied about pregnancy in the past. Corona's testimony provided context to Petitioner's desire to have a baby, but it only bolstered already concrete testimony showing that Petitioner orchestrated the "lick" to kidnap a baby and claim it as her own. While the prosecution could not prove that Petitioner "needed a baby to save her marriage," (Docket Entry No. 1 at 43), without Corona's testimony, that nuance of the case was not determinative. Respondent notes that "Corona provided motive and context for what would otherwise be a wholly inexplicable case." (Docket Entry No. 29 at 64-65). Texas law does not require the prosecution to prove motive. Why Petitioner wanted a baby helped somewhat explain the inexplicable, but sufficient other testimony showed that the desire for a child drove Petitioner's actions. The trial testimony already amply showed that Petitioner wanted a baby and would resort to violence, no matter why she wanted to secure one. But even then, the jury's role was to find that Petitioner intentionally killed the victim or was a party to the offense, not that she did so out of a desperate need for a baby. Why Petitioner thought she needed a baby does not explain or justify why she kidnapped or killed the victim.

Petitioner points to other areas in which Corona's testimony harmed the defense. For instance, Petitioner complains that Corona linked her to a handgun. While Corona identified the gun found at the Zan Vandt address as one similar to Petitioner's gun, it only confirmed Robinson's testimony that he retrieved the weapon from her car. Tr. Vol. 22 at 261. The police recovered a gun from the baby diaper bag in a car Petitioner had been driving. Other testimony covered much of the same ground as that given by Corona. Additional facts that Corona could have revealed with investigation, such as that "Corona met [Petitioner] while she was babysitting his cousin's children . . . not through some friends as he suggested at trial" and that "even after she left him ... [Petitioner] call[ed] in a prescription to Walgreen's for him," would not have added any influential information to the defense case. (Docket Entry No. 1 at 43).

Corona's testimony was obviously important to the prosecution. A former boyfriend's testimony about Petitioner's extreme efforts to preserve their relationship could influence a jury. The thrust of his testimony, however, only corroborated other information already fully before the jury. The evidence at trial allowed the jury to find all of the elements of capital murder even without Corona's testimony. His testimony did not make a conviction or sentence any more likely than it had been before. Petitioner fails to meet *Strickland's* prejudice prong with respect to her allegations involving Corona's testimony.

B. Inadequate Pre-Trial Preparation (claim 1(b))

Petitioner expresses wide dissatisfaction about her attorney's trial preparation, most of which can be distilled into three general complaints. First, Petitioner alleges that her attorneys ineffectively supervised and used a defense investigator, resulting in an inadequate pretrial investigation. Second, Petitioner raises a related complaint that trial counsel's investigation was deficient because it did not include adequate exploration into her background. Finally, Petitioner complains that trial counsel failed to interview Charles Mathis, adequately cross-examine the State's witnesses, or point out numerous inaccuracies in the witnesses' stories. While Petitioner presented some elements of this claim in her initial state habeas application, she did not properly exhaust the entirety of this claim.

Thorough and comprehensive trial investigation is essential to preparing a capital defense. Particularly in light of recent Supreme Court cases such as *Wiggins* that fault attorneys' lapses in trial preparation, defense attorneys assume a heavy burden to develop an effective case against a death sentence. Petitioner's complaints about trial preparation, even if meritorious, however, do not entitle her to habeas relief alone. Preparation is only relevant insofar as it will change the case a reasonable attorney will put before the jury. An inmate must show what more trial counsel should have done and how the absence of that effort prejudiced her trial. Here, much of Petitioner's claims about deficient trial performance subsume her allegations about the trial investigator's work. For instance, Petitioner's claims about trial counsel's failure to call family members as mitigating witnesses also cover her allegations about counsel's failure to speak with family members before trial. The Court will review those allegations in the context of her trial complaints.

Any portion of this claim that is not cumulative of Petitioner's other claims, however, does not show a constitutional violation. Petitioner's claims focus on interviewing witnesses for both the guilt/innocence and punishment phases of trial. For instance, Petitioner complains that trial counsel should have interviewed DEA agent Charlie Mathis before trial so that he could testify that Petitioner "continue[d] to supply information to the DEA and to aid in DEA investigations even though she did not receive compensation and was no longer officially 'on the DEA's books.'" (Docket Entry No. 1 at 55). Petitioner advances this argument in an apparent belief that additional inquiry would have shown that — Mathis' testimony to the contrary notwithstanding — she was some sort of active government agent. Mathis has repeatedly stated that she was not a confidential informant at the time of the murder and his affidavit also states that none of the information she provided warranted renewing her status as an informant. (Docket Entry No. 1, Exhibit 1). In fact, he testified at trial that she did not gave him anything that he "could work a case on." Tr. Vol. 21 at 100.

Also, Petitioner wishes that Mathis had testified that he "would not have used someone like Carty as a confidential informant if he thought [she was] a compulsive liar[.]" (Docket Entry No. 1 at 55). That affidavit, however, conflicts with Mathis' testimony when trial counsel asked him if Petitioner was "a good informant": "Linda, to my knowledge, was truthful when she told me some of the things I was looking for. There are times when I felt that maybe she wasn't as truthful as she should have been, but that's only my opinion." Tr.

Vol. 21 at 118. Trial counsel asked the question Petitioner blames him for not asking, and did not receive a completely favorable response. Even her hope that Mathis would urge the jury not to give her a death sentence is similar to his guilt/innocence testimony that he did not believe Petitioner was capable of committing the crime.

Even then, Petitioner apparently hopes that verifying her constant claims about being a government agent would make her more credible to the jury. Mathis' new affidavit does not provide an account of her work as a confidential informant that is appreciably different from that given at trial. Even the brief time she served a confidential informant was not particularly helpful to her case when a full review of the facts revealed that she only became an informant to avoid criminal charges and lost her status because of criminal activity. Petitioner has not shown that additional pre-trial discussion with Mathis would have helped her case.

Petitioner also faults trial counsel for not interviewing others. For instance, she says that trial counsel should have interviewed Robinson and the other co-perpetrators to prepare better for cross-examination. Nothing, however, shows that Robinson – who himself faced serious criminal charges – would have talked to trial counsel, much less told him something different from what counsel elicited himself on cross-examination. Petitioner has not submitted any affidavit from Robinson or the others alleging that he would have spoken with counsel before trial or told him something different from his trial testimony.

Petitioner's allegations downplay the efforts trial counsel made. Trial counsel made every effort to paint her co-conspirators as undesirable drug users who would "say whatever was necessary to save themselves." State

Habeas Record at 276. Trial counsel extensively cross-examined the witnesses and pointed out inconsistencies and problematic areas in their testimony. The areas that Petitioner identifies that counsel should have emphasized would not have strengthened the defense in a manner distinct from what trial counsel did.

Of her complaints about pre-trial preparation, Petitioner most strenuously complains that trial counsel presented an inadequate defense against the punishment of death. The Court has already reviewed the punishment phase testimony in detail. In essence, trial counsel called Dr. Brown to testify that, psychologically, violence was not a part of Petitioner's character. Trial counsel called Petitioner's mother, daughter, and brother to review her life and affirm that she did not have a violent character. Petitioner alleges that trial counsel should have done more to avoid a death sentence.

1. State habeas proceedings

In state habeas court, Petitioner first claimed that trial counsel inadequately presented evidence that would mitigate a sentence of death. Petitioner argued that trial counsel "failed to adequately investigate and present evidence on the issue of future dangerousness." State Habeas Record at 63. Petitioner specified that the omitted evidence fell into three categories: (1) records from the Harris County Jail showing that she had no disciplinary infractions while awaiting trial; (2) college records showing that, while raising her daughter as a single mother, Petitioner accumulated 26 hours credit, thus showing that she was intelligent and motivated to succeed in prison; and (3) evidence from her childhood and past showing a lack of violence, verified by affidavits from her mother Enid Carty, her daughter Jovelle Carty (both of whom testified at trial), and her siblings Isalyn Carty, Boyce Carty, Verna Connor, and Sonia Carty-

Jackson. State Habeas Record at 64-66. Based on the same affidavits, Petitioner also raised a claim that "counsel failed to adequately investigate and present available mitigating evidence." State Habeas Record at 69.

Petitioner's briefing, however, identified five areas in which she alleged that trial counsel insufficiently presented mitigating evidence. First, trial counsel did not effectively discuss her childhood:

> A proper investigation of Carty's background and family would have revealed that the place of her birth and childhood, St. Kitts, is a very different society than our own. Family members describe St. Kitts at the time of [Carty's] childhood as a "third world country" dominated by sugar can farming. She was born in a rural village of approximately 300 called "Old Road." As was customary her father left home to obtain employment elsewhere so that he might send money home . . . from St. Croix.
>
> [Carty] was uniformly described as a good student who became a primary school teacher after graduating from high school. Family members report some of her old students still ask for her.
>
> She was described as generous and kind.

State Habeas Record at 71-72. Second, Petitioner alleged that trial counsel ineffectively explored her life after she came to the United States with her 18-month-old daughter to live with her sister Verna Connor. Petitioner complained that trial counsel did not show that the "family lived together" and were "supportive of one another," that "Petitioner was actively involved in her brothers' and sisters' lives," and supported her daughter by "work[ing] as a pharmacist . . . braid[ing] hair ... [and] from being an HPD and DEA drug informant for approximately ten years." State Habeas Record at 72.

Third, Petitioner alleged that trial counsel failed to present evidence of her good parenting. Petitioner encouraged her daughter to have a relationship with her father even though he provided no support. Petitioner was active in her daughter's life, helping her become a successful and productive person. State Habeas Record at 73.

Fourth, trial counsel should have amplified the testimony before the jury about the child Petitioner bore from a sexual assault. Petitioner alleged that "the jury never learned of the traumatic emotional impact the sexual assault had upon Carty." Petitioner supported this allegation with an affidavit from Dr. Annette Edons, a psychologist. Dr. Edons reviewed medical records which indicated that Petitioner delivered a healthy daughter in June, 1989. Dr. Edons then stated:

> Upon interview, Ms. Carty stated that the pregnancy was secondary to a sexual assault, which held a traumatic emotional impact upon her. She was unhappy to learn that she was pregnant, and did not want another child. She stated that although she initially thought that she would keep the baby, she found that her feelings were complicated by the residual affect from the assault. After consulting a counselor at the hospital, Ms. Carty began to feel that it was in the child's best interest to relinquish her parental rights and to offer her daughter for adoption. She stated that she has not

> regretted this decision, in that she continues to carry anger about the assault. She was concerned that she would relive the assault when she looked into her daughter's face, and hoped that the child never knew that she had been the product of a rape.

State Habeas Record at 73-74. None of the affidavits from family members discussed the sexual assault or its effect on Petitioner's life. In an affidavit submitted after Respondent's renewed summary judgment motion, a psychiatrist records that Petitioner kept the rape, pregnancy, and childbirth hidden from her family. (Docket Entry No. 32, Exhibit 12B).

Finally, Petitioner complained that trial counsel had not introduced her college records into evidence. State Habeas Record at 74.

With its answer, the State submitted an affidavit from trial counsel Mr. Guerinot who explained his preparation and presentation of punishment phase evidence:

> Regarding the investigation and presentation of evidence on future dangerousness and mitigation, Dr. Jerome Brown was retained to evaluate Ms. Carty. His testimony at trial revealed that Ms. Carty was not a dangerous person, did not have a violent past, and had no discipline or criminal problems as a child. Dr. Brown also testified about Ms. Carty being a victim of a sexual assault and giving a child up for adoption that was conceived as a result of that sexual assault. Ms. Carty had never told me about the sexual assault. Ms. Atkins pointed out in closing arguments in

the punishment phase of trial that the sexual assault and its consequences could be considered mitigating evidence.

Ms. Carty did not provide me with names of people who would testify on her behalf. Ms. Carty did not even want her family to testify but I approached them anyway because I thought their testimony was important. In order to secure Jovelle Carty's, Ms. Carty's daughter's testimony, we were forced to obtain a writ of attachment. We took that drastic step after Ms. Carty, who was under subpoena, did not appear in court as she had promised. Ms. Carty's family told the jury that Ms. Carty was a kind and loving person who taught school before coming to the United States. The jury was made aware of the fact that Ms. Carty raised her daughter on her own without any assistance and encouraged her daughter to have a relationship with her father. Ms. Carty's family asked the jury to spare her life.

Additionally, two police officers, who were the State's witnesses, had previously testified that they had worked with Ms. Carty as a confidential informant for a number of years and enjoyed a cordial relationship with her. One even testified that he found it hard to believe that Ms. Carty could have been involved in this type of crime. I did not subpoena Ms. Carty's jail records because I did not want to open the door to the State offering testimony that Ms. Carty had threatened another

> inmate. I had made it abundantly clear for the jury that Ms. Carty was an intelligent woman who worked hard and I did not believe that her college records could make that point any stronger.

State Habeas Record at 278-79.

Petitioner's third response included as exhibits eight "statements" obtained by an attorney in St. Kitts. The exhibits were all written in the same handwriting, signed by the individual to whom the statement was attributed, but not dated, notarized, or otherwise authenticated. State Habeas Record at 407-72. Petitioner summarized the content of these exhibits as follows:

> In brief their statements indicate that not only was Ms. Carty a school teacher, she also taught Sunday School. She demonstrated a genuine desire to better the lives of those less fortunate by organizing student trips to help the sick and needy. She also sought to instill in her students a belief that they could excel beyond school and that they should not allow themselves to be held back in life. While Ms. Carty was a gifted athlete, she also became involved in the movement that led to St. Kitts independence. She was well known for sharing her relative wealth with those less fortunate by paying their bus fare and food.

State Habeas Record at 405.

Petitioner's third response contained amplified affidavits from Petitioner's family members as well as affidavits from other siblings, including Sonia Carty Jackson, State Habeas Record at 603, Isalyn DeSouza, State Habeas

Record at 606-09, Verna Connor, State Habeas Record at 611-13, Enid Carty, State Habeas Record at 615-17, Yvette Jacqueline Carty-Innes, State Habeas Record at 619-21, Boyce Carty, State Habeas Record at 623-25, Clarence Eugene Carty, State Habeas Record at 627-28, and Jovelle Jobert (Carty), State Habeas Record at 630-35. These affidavits covered the same ground, though in a more detailed manner, as the affidavits attached to her initial state application. She also presented an affidavit from Dr. Gilda Kessner proposing psychological punishment phase testimony. State Habeas Record at 675-78.

The state habeas court reviewed the defense's punishment phase case. FFCL, at 7-9,¶¶ 31- 33, 35, 37. The state habeas court found "on the credible affidavit of counsel Jerry Guerinot, that trial counsel investigated the issue of future dangerousness; that trial counsel requested and received funds to hire an expert to evaluate [Petitioner's] mental condition and determine whether she was a continuing threat to society; and, that counsel retained psychologist Jerome Brown as an expert on future dangerousness and mitigation." FFCL, at 8, ¶34. The state habeas court, in essence, found that Petitioner was not a cooperative or helpful client: "[Petitioner] did not tell trial counsel that she had been sexually assaulted; that [she] refused to give trial counsel names of potential witnesses; and, that [she] did not want her family to testify and instructed counsel not to contact her family." FFCL, at 9, ¶37. Citing the affidavits that Petitioner filed with her initial habeas application, the state habeas court found "that trial counsel presented at punishment essentially the same mitigating evidence that [Petitioner] now claims on habeas should have been presented." FFCL, at 9, ¶ 40. Because trial counsel's strategy was "to argue[] to the jury that not one witness had been called to testify that [Petitioner] had threatened other inmates or caused any problems in the jail," "trial counsel did not subpoena [Petitioner's] jail records because counsel did not want to open the door to the State offering testimony that [Petitioner] had threatened another inmate." FFCL, at 9, ¶¶ 40-41.

The state habeas court concluded that trial counsel "cannot be considered ineffective . . . in light of counsel's investigation and presentation of thorough punishment evidence" which mirrored that relied upon in the habeas application. FFCL. at 18, ¶ 9. Additionally, the state habeas court endorsed trial counsel's tactical choice not to rely on Petitioner's jail records. FFCL, at 19, ¶ 11. The state habeas court concluded that Petitioner's unhelpful disposition hampered trial counsel's ability to investigate and present mitigating evidence. FFCL, at 19, ¶12. The state habeas court also concluded that there was no *Strickland* prejudice because Petitioner's family members "actually testified at trial and the proffered testimony was essentially the same as evidence presented at trial." FFCL, at 18, ¶10. The state habeas court relied on case law holding that failing "to elicit more detailed character evidence was not prejudicial and did not affect the reliability of the proceedings." FFCL, at 18-19, ¶ 10 (citing *Rosales v. State*, 841 S.W.2d 368, 378 (Tex. Crim. App. 1992)).

2. Federal habeas review

For the first time on federal review, Petitioner presents new affidavits from people who knew her when she lived on St. Kitts and before she left in her early adulthood. (Docket Entry No. 1, Exhibits 13, 26, 29, 42, 43-52). These affidavits put in admissible form statements made in the unsworn documents Petitioner attached to her third response. Also, Petitioner submits new affidavits from individuals such as Mathis, who would have stated that they did not consider Petitioner to be violent, a compulsive liar, or worthy of a death sentence. She also presented new psychological evidence to discuss, among other things, what more she wanted Dr. Brown to do.

Serious questions arise concerning the exhaustion of these new affidavits. Federal law tolerates the expansion of habeas claims if they do not change the nature of the allegations made in state court. *See Morris v. Dretke*, 379 F.3d 199, 204-07 (5th Cir. 2004); *Anderson*, 338 F.3d at 388. While the new affidavits relate to the information presented in state court, they mostly bolster allegations from the third response that did not fairly place Petitioner's claims before the Texas courts. Even then, some affidavits have been submitted apparently to cure authentication problems that may have prevented their full consideration in state court (had they been fairly presented). The Court, however, will briefly consider their merits as their allegations relate to material Petitioner presented some of the material, albeit in unauthenticated and inadmissible form, in state court. *See* 28 U.S.C. § 2254(b)(2).

3. Petitioner's punishment phase defense

Under prevailing federal precedent, this Court's review of trial counsel's performance is highly deferential. The AEDPA's respect for state-court decision only augments *Strickland's* standards. The state habeas court concluded that Petitioner's allegations on habeas review only sought to amplify information already before the jury. In assessing *Strickland* claims, a reviewing court compares and contrasts the new evidence with that from the trial. The Fifth Circuit has refused to find *Strickland* error when trial counsel presented similar mitigating evidence, even if only in outline form, at trial. *See Coble v. Quarterman*, 496 F.3d 430, 437 (5th Cir. 2007); *Rodriguez v. Quarterman*, 204 F. App'x 489, 501 (5th Cir. 2006); *Alexander v. Quarterman*, 198 F. App'x 354, 359-

60 (5th Cir. 2006); *Parr v. Quarterman*, 472 F.3d 245, 257-58 (5th Cir. 2006). A state court may not be unreasonable in finding no *Strickland* prejudice even when the new evidence "was presented to the jury in an abbreviated form with no elaboration." Neal *v. Puckett*, 286 F.3d 230, 238 (5th Cir. 2002). This Court "must be particularly wary of 'arguments that essentially come down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second-guessing.'" *Dowthitt v. Johnson*, 230 F.3d 733, 743 (5th Cir. 2000) (quoting *Kitchens v. Johnson*, 190 F.3d 698, 703 (5th Cir. 1999)).

As found by the state habeas court, the thrust of Petitioner's new evidence only adds upon that which trial counsel presented: "trial counsel presented at punishment essentially the same mitigating evidence that [Petitioner] now claims on habeas should have been presented." FFCL, at 9, ¶39. A summary of the testimony that Petitioner has developed after trial differs little from trial counsel's punishment phase strategy. Petitioner's new affidavits, like trial counsel's lingering-doubt defense, rest not only on the premise that Petitioner did not kidnap or kill, but that she was incapable of those actions. The mitigating evidence does not excuse, justify, or explain her crime, but denies her commission of it. Petitioner bolsters this testimony with good character evidence from friends and family. She frames that evidence with psychological expert testimony that she is innocent. Petitioner couples this with abundant good character evidence showing that she was a good citizen while living in St. Kitts, a good mother to her daughter, a good support to her family, and a helpful citizen through her overstated work as a confidential informant. Petitioner hopes that a jury would feel sympathetic for her because she developed these positive traits in the face of challenges like an impoverished background and a sexual assault that resulted in pregnancy.

The jury had before it testimony showing that Petitioner had previously not been violent, was loved by her family, showed concern for and was loved by others, was a good mother, had served as a teacher, bore a child conceived in a sexual assault, went to college, was a confidential informant, and other testimony similar to that developed after trial. While the new evidence fleshes out the outlines presented at trial, the jury had before it information of the same mitigating thrust. While not of the same quantity, the defense presented evidence of the same nature as that developed after trial. To whatever extent the trial testimony lacked the depth exhibited by Petitioner's post-trial evidence, the breadth of testimony is nearly identical. The trial evidence largely followed the same themes and allowed for the jury to arrive at the same conclusions as they would if they had the entirety of the mitigating evidence developed after trial before them, notwithstanding any inartistic presentation of that evidence. With regard to the mitigating evidence, "[i]t must be conceded that the jury was presented a clear, if not fully portrayed, picture of [Petitioner's] life." *Neal*, 286 F.3d at 243. "[T]hough perhaps not as effectively as it might have been, the jury did hear [the mitigating] evidence." *Parr*, 472 F.3d at 258. No Supreme Court case has yet found *Strickland* error when post-trial investigation fills in the outlines that trial counsel chalked out at trial.

Even now, some of the information Petitioner relies upon clashes with that Petitioner gave around the time of trial. For instance, Petitioner's complaint that St. Kitts was a "third world country" conflicts with the information she provided Dr. Brown. She described an "elite" upbringing when questioned contemporaneous with trial. Other evidence would have been double-edged at best. Admission of Petitioner's jail records would have shut the door on trial counsel's ability to argue in closing that she posed no threat to the prison population. By not presenting evidence of her incarceration, trial counsel could argue that the State itself did not show violent acts in jail, thus preventing the jury from dwelling on her threats. *See Ransom v. Johnson*, 126 F.3d 716, 724 (5th Cir. 1997) (refusing to find prejudice if the unpresented evidence "also contained evidence that, if disclosed, would have been detrimental to [the defense] case"); *see also Dowthitt*, 230 F.3d at 745; *Kitchens*, 190 F.3d at 703; *Cockrum v. Johnson*, 119 F.3d 297, 304 (5th Cir. 1997).

While the individuals from St. Kitts aver that they would have conveyed the same information to trial counsel, Petitioner has not shown which of them would have traveled to Houston or how Petitioner could have presented their information other than through an expert as she already did through Dr. Brown. Much of the information she faults counsel for not presenting relates to her adolescence and early adulthood in St. Kitts. The St. Kitts affidavits submitted by Petitioner have been prepared by people removed both by time and geographic location from her life at the commission of the capital murders. Petitioner left St. Kitts two decades before the crimes. Most of the affiants had not spoken to Petitioner in many years. Her good character evidence appears both weak and stale when compared to her criminal acts and violent actions. Petitioner has not shown how the good person from St. Kitts became the woman who "hung around with these people [who sold large amounts of cocaine]. She was in the know," Tr. Vol. 25 at 63, much less the one who killed to kidnap a baby. The jury would not see the new information as representative of the woman Petitioner was when she stole cars, organized drug deals and "licks," and became a murderer. The life Petitioner lived on St. Kitts was distant from that she chose to live in Houston.

Even her family members who testified could not explain the disconnect between the woman they knew and the woman who committed crimes. The Court cannot turn a blind eye to the fact that, if the State were afforded an opportunity to cross-examine each affiant, the prosecutors would certainly assail them with Petitioner's criminal history and the brutal facts of the crime she committed. Because the affidavits do not reconcile the life that Petitioner lived long ago in St. Kitts with her lawlessness, Petitioner gives little hope that witnesses would not testify, like her brother, that "She's always been kind, and she's always been a gentle person. So it's, like, right now I'm kind of overwhelmed with all this stuff that is going on. It's like, that's not really the [Petitioner] that I know that they are talking about." Tr. Vol. 26 at 84. The affiants do not describe how they would respond — other than with disbelief — when presented with the crime for which the jury convicted Petitioner, the auto theft to which she pleaded guilty, and other bad acts. Without reconciling the two widely divergent perspectives on Petitioner's life, aggravating circumstances would deaden the effect of the mitigating evidence.

The jury would likewise weigh the new testimony against Petitioner's crimes. *Strickland*'s prejudice prong does not allow the Court to view the new evidence in isolation, but in the context of the aggravated circumstances presented at trial. The state habeas court here viewed the highly incriminatory evidence against Petitioner:

> [Petitioner] instigated the offense and recruited a gang of thugs to burglarize the pregnant complainant's apartment ... [and]

> repeatedly stated that she would cut the baby out of the complainant ... told people that she would soon have a baby .. . collected medical supplies and baby care items prior to the offense . . . ordered others to tape the complainant ... was by the trunk immediately before the complainant was found dead with a plastic bag over her head . . . and, that [she] asked Combs to burn the complainant's body.

FFCL, at 12, ¶52. The "horrific facts of the crime," Martinez *v. Quarterman*, 481 F.3d 249, 259 (5th Cir. 2007), the "brutal and senseless nature of the crime," *Smith v. Quarterman*, 471 F.3d 565, 576 (5th Cir. 2006), or the "cruel manner in which [a defendant] killed," *Miniel v. Quarterman*, 339 F.3d 331, 347 (5th Cir. 2003), may weigh heavily against a finding of *Strickland* prejudice. *See also Strickland*, 466 U.S. at 700; *Knight v. Quarterman*, 186 F. App'x 518, 535 (5th Cir. 2006); *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002); *Andrews v. Collins*, 21 F.3d 612, 624 n.23 (5th Cir. 1994); *Russell v. Lynaugh*, 892 F.2d 1205, 1213 (5th Cir. 1989). In addition, the state habeas court found that the following facts supported the jury's answers to the special issues:

> [Petitioner] was arrested for auto theft in 1992 . . . was placed on a contract as a confidential informant . . . consistently refused to follow the rules of the contract . . . was subsequently charged with possession of marijuana, rendering [her] contract as a confidential informant void . . . received probation for auto theft . . . [did not] stop [her] car in the possession of marijuana case [until] after a high speed chase . . . and

> two guns were recovered from [her] stopped car.

FFCL, at 12, ¶ 53. Testimony of Petitioner's familiarity with and deep involvement in the drug world, participation in other criminal offenses, repeated misrepresentations including about being a government agent, and violent tendencies exacerbated the effect of the murder Petitioner committed. The facts of Petitioner's crime and her life sharply undercut much of her mitigating evidence. Testimony about Petitioner's love of family and concern for others seemed shallow and incomplete in light of her abduction and murder of a young mother.

Petitioner has not shown that the information she presents would have aided her defense any more effectively than that presented at trial. Even now, Petitioner's mitigating evidence in no way reconciles her criminal activity with her life as perceived by her friends and family. Simply, as with evidence already presented, there is no evidence that additional "testimony of character witnesses to his reputation as a 'good and peaceful person' would have sufficiently impressed the jury to avoid the sentence of death." *Carter v. Johnson*, 131 F.3d 452, 465 (5th Cir. 1997). Insofar as Petitioner relies upon the information she presented to the state courts, the state habeas court was not unreasonable in finding no *Strickland* prejudice. *See* 28 U.S.C. § 2254(d)(1). To the extent her claims exceed the claims adjudicated on the merits, she has not otherwise shown an entitlement to federal habeas relief.

C. Misuse of an Expert Witness (claim 1(c))

Dr. Jerome Brown interviewed Petitioner before trial, prepared a report for the defense describing the results of his examination, and testified in the punishment phase.

Petitioner now claims that trial counsel did not utilize Dr. Brown in the most effective manner. Petitioner complains that trial counsel should have called Dr. Brown in the guilt/innocence phase to provide "invaluable testimony concerning Petitioner's lack of capacity to commit capital murder[.]" (Docket Entry No. 1 at 68). Even regarding his punishment phase testimony, Petitioner contends that trial counsel failed to prepare Dr. Brown adequately, exposing his opinion to brutal cross-examination and leaving untouched important mitigation avenues.

1. Guilt/innocence phase

On December 20, 2001, the trial court appointed Dr. Brown as the defense expert and ordered the State to allow him access to her for testing. Dr. Brown interviewed and tested Petitioner before trial. Because of that testing, Dr. Brown concluded that Petitioner did not meet the standard psychological profile of a murderer. Based on an affidavit he prepared for the "third response," Petitioner complains that trial counsel should have called Dr. Brown to testify in the guilt/innocence phase. Petitioner contends that the jury would have found her not to be guilty had Dr. Brown testified that her "psychological profile is entirely inconsistent with the deliberate planning and carrying out of the violent acts she is accused of committing." State Habeas Record at 667. Dr. Brown based that conclusion on various factors, including:

a. her lack of aggression, non-coercive manner, and non-threatening demeanor [which] are all inconsistent with participation in a deliberate act of violence against another;

b. she does not exhibit the generalized defensiveness often exhibited by individuals facing serious criminal charges;

c. at a minimum, Ms. Carty's intellectual ability is in the average range;

d. there is no evidence of pent-up hostility or struggles with aggressive urges; and

e. she is not predatory, callous, or looking to take advantage of others.

State Habeas Record at 667. Dr. Brown opined that, "[i]n summary, the crime Ms. Carty is alleged to have committed cannot be explained on the basis of her personality characteristics, character structure, or the general in which she has conducted her entire life." Dr. Brown stated that, if called in the guilt/innocence phase, he would have testified that "Ms. Carty's psychological profile is entirely inconsistent with the profile of the perpetrator of the crime[.]" State Habeas Record at 667.

As Respondent recognizes:

> Carty has entirely failed to establish that Dr. Brown would have been allowed to testify at [the guilt/innocence] stage. Nowhere is Carty's mental state put in issue. She was found competent to stand trial. She was not mentally retarded; nor did she suffer from any mental illness. That Carty certainly would have liked to have Dr. Brown pontificate that she was not capable of committing the crime with which she had been charged, such testimony would have been wholly irrelevant on this record. Further, he was not an eyewitness to the crime, and in fact had no personal

> knowledge about the events leading up to it or anything that happened in the aftermath.

(Docket Entry No. 28 at 96-97). In Texas, "[e]xpert testimony should be admitted only when it is helpful to the jury." ***Williams v. State***, 895 S.W.2d 363, 366 (Tex. Crim. App. 1994). "The expert must make an effort to tie pertinent facts of the case to the scientific principles which are the subject of his testimony." ***Jordan v. State***, 928 S.W.2d 550, 555 (Tex. Crim. App. 1996). Dr. Brown's testimony was not helpful to a jury which had to consider strong testimony showing that, no matter how she may present herself to psychologists, Petitioner orchestrated the kidnapping of two people and actually killed one of them. Questions of guilt and innocence are matters the law leaves to juries; an expert's opinion of whether harmony exists between a person's psychological characteristics and their actions are irrelevant to a juror's guilt/innocence duty. Petitioner has not shown that the trial court would have allowed Dr. Brown to give his speculative psychologist exegesis in the guilt/innocence phase.

Next, Petitioner points to specific arguments that Dr. Brown could have made that she alleges would have undercut the prosecution's theory of the case. Petitioner alleges that Dr. Brown could have demolished the "specific intent element" of the prosecution's case. To prove intent under the instructions given the jury, the prosecution had to show that Petitioner intended to asphyxiate the victim or was a party to that crime. Petitioner challenges factual issues that led up to the murder and the things she told others that only inferentially impact the jury's consideration of what she intended to do when she killed the victim. For instance, Petitioner contends that trial counsel should have had

Dr. Brown testify in the guilt/innocence phase that (1) the bandage scissors could not cut human flesh, especially when the victim had already given birth, and (2) anyone believing that they could extract a fetus with such scissors suffers from a mental impairment.

Petitioner has not shown that Dr. Brown, a psychologist, possessed any greater expertise than members of the jury on the question of whether the scissors could cut human flesh. Even so, trial counsel forcefully argued that the scissors posed no threat to the victim. Tr. Vol. 24 at 126. Nothing suggests that bolstering that argument with expert testimony would have further weakened the case against Petitioner. But then, Petitioner again unduly confuses the emphasis on the scissors. The value in emphasizing the scissors did not come from showing a specific (and fulfilled) manner to kill the victim. The question of whether the scissors could cut through human flesh was not a consideration when Petitioner placed a bag over the victim's head. The value in introducing the statements was to show the violent and brazen stance Petitioner took toward the abduction. Even Robinson deduced that Petitioner all along knew that the victim had already given birth. The question is not whether the scissors objectively could have removed baby Ray from his mother. The question is what was in Petitioner's mind when she made the statement and what it said about her willingness to harm others. Dr. Brown's proposed testimony would not have changed the fact that Petitioner told others that she was "going to cut the baby out of the lady and take the baby." Tr. Vol. 21 at 222; Vol. 22 at 63-64, 161-62.

Petitioner also argues that trial counsel should have called Dr. Brown to testify that it would not be likely that Petitioner would try to pass the baby off as her own because they were not of the same race. Dr. Brown stated in his affidavit that "a perpetrator is incredibly unlikely to kidnap a child of a different race with the intent of passing it off as the perpetrator's own child." Dr. Brown also states that anyone who would try to do so possesses serious mental impairment. Petitioner argues that trial counsel failed to mock the prosecution's argument that Petitioner "intended to pass off the child as her own offspring notwithstanding the visibly different racial composition." (Docket Entry No. 1 at 71). Petitioner fails to acknowledge that she consistently told people that Corona, who apparently had a shared racial identity with the victim, fathered baby Ray. Petitioner falsely told those not involved in the murder that she was pregnant with Corona's child. Dr. Brown's comments do not address the fact that the baby Petitioner abducted shared the same race as the man she told everyone had fathered the child. It requires no great stretch of logic to assume that she would want to steal a child of the same racial heritage as her boyfriend/husband. Petitioner's claim lacks a reasonable basis when viewed with a full picture of the trial record.

In the end, Petitioner has not shown that the trial court would have allowed Dr. Brown to testify in the guilt/innocence phase. Petitioner has also not shown that his proposed testimony fully appreciates the evidence against her. Finally, Petitioner has not shown that Dr. Brown's proposed guilt/innocence testimony would have impacted the trial in the way anticipated by *Strickland* jurisprudence.

2. Punishment phase

Petitioner claims that trial counsel inadequately prepared Dr. Brown for the punishment phase of trial by not preparing him for the State's cross-examination and not allowing him to craft a strong future-dangerousness defense. First, Petitioner faults counsel for not allowing

Dr. Brown to review Petitioner's medical and prior offense records. Petitioner claims that Dr. Brown was completely unaware of Petitioner's crimes. Petitioner argues that, had trial counsel prepared Dr. Brown, he could have denied that she repeatedly told others she was pregnant when she was not. Also, Petitioner alleges that Dr. Brown could have provided justifiable excuses for Petitioner's earlier legal problems. Petitioner faults trial counsel for not providing Dr. Brown with a psychological report that the prosecution used to show that Petitioner fit the profile of a child abductor. Finally, Petitioner maintains that trial counsel ineffectively used Dr. Brown to show that she would not be a future societal danger.

Dr. Brown's report details a familiarity with facts of the case, Petitioner's history, and the crimes. Tr. Vol. 28, Defendant's Exhibit 1. He reviewed the trial investigator's report that contained information about Petitioner's history and crimes. The report from Dr. Brown and the investigator show that they asked her probing questions. Dr. Brown's trial testimony does not reveal that the prosecution's recitation of facts during his cross-examination surprised him. Tr. Vol. 26 at 34-38. Rather, he did not take those facts into account because Petitioner told him she "didn't do it[.]" Tr. Vol. 26 at 38.

Dr. Brown has provided an affidavit on federal review complaining that he "did not have Ms. Carty's offense reports" so he could not "challenge the prosecutor's questions" about her arrest, as the following interchange shows:

The State: If she was on a drug purchase of 50 pounds of marijuana or more, she was the driver of the vehicle and during the course of trying to be pulled over, she attempted to run down a police officer who had a weapon pointed at her directly in the car, would that be a person who would not be dangerous, in your mind?

Dr. Brown: Might not be.

The State: Might not be dangerous?

Dr. Brown: Might not be a person who was not dangerous.

Tr. Vol. 26 at 29. Dr. Brown now avers that "[a]s to the exchange above, for example, I would have answered that Ms. Carty was conducting a sting operation on the part of the DEA and that she was forced to drive under duress, with a gun pointed at her." (Docket Entry No. 1, Exhibit 9).

Dr. Brown had a copy of the investigator's report showing the commission of that offense. What Dr. Brown apparently did not have was Petitioner's explanation for that crime. Petitioner has not explained why she did not provide that story to Dr. Brown during his interviews. Moreover, Petitioner has not provided anything to verify that story. She has not reconciled the trial testimony that she was not authorized to engage in that drug sting, and in fact, that another confidential informant told the police about the drug buy that led to her arrest. Petitioner has not shown that a reasonable attorney would have known about that alleged explanation and presented it to an expert witness or a jury.

Petitioner has provided an affidavit in which Dr. Gilda Kessner, a psychologist, states that Dr. Brown should have uncovered Petitioner's justification for that crime (and made a more-detailed psychological investigation in other areas). (Docket Entry No. 1 at 14). She also points to other areas in which Dr. Brown should have acted differently. The Constitution does not guarantee the effective assistance of psychological expert witnesses.

The question is what information trial counsel gave to his witness and how he used the expert's opinion. Petitioner has not shown that trial counsel could have verified Petitioner's proposed justification for her past crimes.

Petitioner also faults trial counsel for not preparing Dr. Brown to answer questions about Petitioner's stories about being pregnant. Dr. Brown states that he would have refuted the prosecution's argument that Petitioner continually concocted phantom pregnancies. The testimony would have seemed weak against the many witnesses that testified that Petitioner repeatedly and falsely claimed to be pregnant. Dr. Brown testified against the backdrop of a woman who was consistently deceptive about her employment history, her pregnancies, her crimes, and other areas of her life. Petitioner hopes that Dr. Brown could have wiped away or watered down these stories. Any testimony Dr. Brown could have given that Petitioner's psychological profile was not one of a woman who would deceive about being pregnant would contrast sharply with the testimony of many witnesses who said she had done such things. Dr. Brown's proposed response would not change the landscape of unfavorable information before the jury. Dr. Brown's proposed testimony in the face of credible witnesses would only diminish his credibility in the eyes of the jury. While Petitioner argues that Dr. Brown could have argued that her stories about pregnancy and her government service, plus her earlier crimes, should not figure into answering the future dangerousness issue, the factors did show Petitioner to be dishonest, manipulative, controlling, and willing to do what she wanted to accomplish her desires despite the law.

During the cross-examination of Dr. Brown, the prosecution referred to a study by the National Center for Missing and Exploited Children that identified factors common to child abductors. Petitioner complains that trial counsel did not alert Dr. Brown that the prosecution would rely on that study. Because Petitioner exhausted this argument in state court, the state habeas court made specific findings and conclusions. Dr. Brown conceded that, while not familiar with that particular study, he was familiar with other studies from the National Center for Missing and Exploited Children. Tr. Vol. 26 at 43; State Habeas Record at 774, ¶18. Trial counsel objected because Dr. Brown was not familiar with the study and the trial court overruled his objection. State Habeas Record at 774-75, ¶¶ 19, 22; Vol. 26 at 43. The objection, however, prevented the prosecution from reading portions of the study into the record. State Habeas Record at 775, ¶20.

Petitioner has not shown that trial counsel anticipated or should have anticipated that the prosecution would cross-examine Dr. Brown with that study. Even then, Dr. Brown was already generally aware of similar studies. When the prosecution referred to the study, the prosecution asked questions about a hypothetical defendant bearing characteristics similar to Petitioner. The state habeas court found that the defense could not have made a sustainable objection to the hypothetical questions. State Habeas Record at 788, ¶5. In fact, trial counsel discussed the study at much greater length than the prosecution to emphasize that Petitioner did not meet the standard profile of a child abductor. Tr. Vol. 26 at 50-53.

In the end, whether or not Petitioner fit the profile of an abductor, testimony showed that she abducted a baby. Petitioner has not shown that counsel was not effective for providing Dr. Brown with psychological studies dealing with child abductors. By the time that the study was brought before the jury, they had already found that Petitioner had abducted a baby.

Finally, Petitioner alleges that trial counsel did not use Dr. Brown effectively as a defense against an unfavorable answer to the future-dangerousness special issue. Petitioner alleges that counsel should have presented through Dr. Brown the information that this Court has already addressed: mitigating testimony about Petitioner's background and alleged non-violence in prison. This Court has already addressed the impact of that evidence if presented through primary witnesses; nothing indicates that the added veneer of psychological testimony would have measurably strengthened its impact or importance.

In short, Petitioner fails to show that trial counsel's preparation of Dr. Brown fell below constitutional norms. Importantly, for the same reasons discussed above, Petitioner has not shown that more-effective testimony by Dr. Brown would have resulted in a reasonable probability of a different result. The Court denies Petitioner's ineffective-assistance claims in that regard.

D. The Future-Dangerousness Defense (claim 1(d))

Petitioner alleges that trial counsel should have presented a stronger case for a favorable answer on the future dangerousness issue. Petitioner did not properly exhaust this claim.

Petitioner alleges that trial counsel should have called an expert to testify that, if she received a life sentence, she would not be eligible for parole for 40 years. Even without the imprimatur of expert testimony, trial counsel made the jury sufficiently aware of the severity of a life sentence and that she would be incarcerated for at least 40 years if given a life sentence. Tr. Vol. 26 at 119-21.

Petitioner also argues that trial counsel should have presented testimony or evidence that she would not be a threat in prison. As previously discussed, trial counsel's closing stated that Petitioner would not be violent in prison. She, however, had threatened inmates with violence before trial. The defense wisely hedged on trial discussion of her previous violence while still making the same argument before the jury. This strategy allowed trial counsel to make the statement that "no evidence has ever shown that she had been a threat" when incarcerated, rather than have to explain away her threats while in jail. Tr. Vol. 26 at 109. Finally, Petitioner alleges that trial counsel failed to inform the jury of the harsh conditions of prison life. While Petitioner elsewhere criticizes counsel for saying that life imprisonment may be a worse penalty than a death sentence, the fact that prison is an uncomfortable place is not beyond the common knowledge of jurors. Trial counsel reminded the jury during closing arguments about what a serious sentence life imprisonment would be. Trial counsel would not need to call an expert for the jury to understand that life imprisonment is a severe sanction. Indeed, trial counsel's closing argument rested, in part, on the jury finding that life imprisonment would be a harsh enough sentence. Petitioner has not shown a reasonable probability of a different result if counsel performed as indicated. The Court will deny this claim.

E. Investigation of the Cause of Death (claim 1(e))

Petitioner faults trial counsel for not challenging thoroughly enough the prosecution's theory of how the victim died. Petitioner focuses on two arguments: that trial counsel should have sought expert assistance to challenge the cause of death and that counsel should have rebutted the statements that Petitioner intended to cut the baby from the victim. Neither allegation serves as a viable ground for habeas relief.

Petitioner argues that Dr. Shrode, the assistant medical examiner who testified at trial, explained that "either the position of [the victim's] body in the trunk, *or* the taping of her mouth, *or* the placement of a plastic bag over her head could have caused her death." (Docket Entry No. 1 at 82) (emphasis in original). Petitioner contends that trial counsel should have sought out an expert who would have blamed her death on something other than Petitioner placing a plastic bag over the victim's head.

In support of her claim, Cary presents an affidavit from Dr. Lloyd White, a medical doctor who has performed and reviewed many autopsies. Dr. White reviewed Dr. Shrode's trial testimony, the autopsy report, and photographs of the crime scene. Dr. White "disagree[d] with the conclusion that positional asphyxia was a possible cause of death," because the victim could have moved to reposition her body. Dr. White also opined that the taping of the victim's mouth did not likely cause her death because "[t]he photographs indicate that her nose was not taped." Finally, Dr. White concluded that the "acts that Dr. Shrode concluded could have caused Mrs. Rodriguez' death are not generally of the type that indicate an intention to kill or cause serious bodily injury." Specifically, "[a] plastic bag is used to cover a person's head so that they may not see or be seen." "When these acts result in death it is usually through the negligence or recklessness with which they were done rather than an intent to kill." (Docket Entry No. 1, Exhibit 31).

On state habeas review, trial counsel submitted an affidavit explaining his strategy in challenging the victim's death. Trial counsel thought that he could more effectively challenge the intent element of capital murder by cross-examining the State's expert than by seeking a separate expert witness. State Habeas Record at 276. Trial counsel reinforced this strategy by seeking a lesser-included-offense instruction of felony murder. The state habeas court issued detailed factual findings that conclusively establish that counsel was not ineffective in their efforts to challenge the State's theory of what caused the victim's death:

> 9. The Court finds that, during the applicant's trial, assistant medical examiner Paul Schrode testified that the cause of the complainant's death was suffocation by homicide; that a plastic bag had been placed over the complainant's head and then ripped; and, that the complainant's mouth and underneath her nose was then taped.
>
> 10. The Court finds that, during the applicant's trial, assistant medical examiner Paul Schrode, testified that he based his conclusions on the imprint of the complainant's face and lips on the plastic bag, an imprint would not have occurred if the bag had not been first placed on the complainant's head.
>
> 11. The Court finds that, during the applicant's trial, State's witness Chris Robinson testified that Carliss Williams taped the complainant's hands, feet, and mouth before a bag was placed on the complainant's head.

12. The Court finds, based on the appellate record and the credible affidavit of trial counsel Guerinot, that counsel reviewed the autopsy report to prepare for cross-examination of assistant medical examiner Paul Schrode, that counsel followed the overall defensive strategy of attempting to cast doubt as to whether the complainant's death was intentional through cross-examination of Schrode, rather than presenting a hired expert to the jury; and, that counsel elicited possibly beneficial testimony during cross-examination of Schrode.

13. The Court finds, based on the credible affidavit of counsel Guerinot, that counsel also made the strategic decision to attack the credibility of State's witness Chris Robinson through the contradiction between the testimony of Robinson and of assistant medical examiner Schrode.

14. The Court finds that, at the conclusion of the guilt-innocence phase of the applicant's trial, trial counsel argued that the complainant's death was not intentional; that the State had the burden to show that the applicant had the specific intent to kill the complainant that the complainant was not strangled; that there were

no handprints indicating that the complainant was choked to death; that the State's theory was attacked by assistant medical examiner Schrode's testimony that the bag was first placed on the complainant's head; and, that the complainant was placed in the trunk, forgotten, and died.

15. The Court finds that trial counsel pursued a reasonable, plausible trial strategy to attempt to attack the State's burden of showing that the complainant's death was intentional.

16. The Court finds speculative the habeas affidavit of Dr. Lloyd White, presented by the applicant in the instant application for writ of habeas corpus, asserting that the complainant could supposedly breathe through her nose while inside the trunk of the car, and that the complainant could supposedly have repositioned herself so that she could breathe.

17. The Court finds unpersuasive the habeas affidavit of Dr. Lloyd White, presented by the applicant in the instant application for writ of habeas corpus, asserting that placing a person face down in a car trunk, taping that person's habeas, feet, and mouth, and then placing a plastic bag over that person's head supposedly are not actions that show

> an intent to kill or cause serious bodily injury.

FFCL, at 2-4, ¶¶9-17. The state habeas court concluded that "[c]ounsel are not ineffective for choosing the reasonable trial strategy of attacking Paul Schrode, the assistant medical examiner, through cross-examination of Schrode, rather than hiring a defense expert, and eliciting potentially beneficial testimony concerning the applicant's intent during Schrode's cross-examination." FFCL, at 15, ¶1. The state habeas court found that Petitioner had not met *Strickland's* performance or prejudice prongs in that regard. FFCL, at 15-16, ¶ 2.

The prosecution insisted that the evidence proved that the victim has suffocated and that Petitioner was to blame. The prosecution here explained its theory of Petitioner's intent: "When you kidnap somebody and stuff them in a trunk until they suffocate to death, that is not felony murder. It's not an afterthought. . . . This is capital murder. Intent to kill was formulated previously." Tr. Vol. 24 at 114. Again,

> You heard what [Robinson] said as to who did this, who was responsible for putting the bag over [the victim's] head, and you think about who wanted [the victim] dead? Who needed [the victim] dead so that she could start her own life, her own family with [the victim's] baby as her own? It ain't [Robinson]. [Robinson] is in this up to his eyeballs, but it ain't [Robinson] and it ain't [Zebediah Combs] and it ain't Josie [Anderson] or [Marvin Caston] or [Carliss Williams] or Gerald [Anderson]. The person who needed – who had to have that lady dead so that she could be the sole

> mother of baby Ray is this defendant, is Linda Carty?
>
> Intentional? You bet it was, ladies and gentlemen. There is nothing more intentional than putting a bag over this lady's head, by having her mouth taped, by having her hands taped, having her legs taped and stuffed in a trunk. . . . . [T]he next day when that trunk was opened, [Petitioner] looked in there, did she gasp? Was she shocked? Did she make any outward sign that when she looked in that trunk, it wasn't going to be exactly as she left it? She did not. And as soon as that trunk lid was shut, what did [Petitioner] talk about? "How are we going to get rid of this body? What are we going to do with this body? I've got to get this rental car back." Is that the coldest thing you have ever heard? "I've got to get this rental car back. What are we going to do? Should we burn her? Do you got a barrel? Do you need me to buy a barrel?" Intentional? That's this defendant. Cold? That's this defendant.
>
> What this defendant wanted, this defendant needed, was Baby Ray because her life was falling apart and she needed a baby to bring it back together again. . . . Did she have to have that baby. Yes. In her mind, she did. And she didn't care who had to die.

Tr. Vol. 24 at 152-54. Trial counsel made strong efforts to challenge this testimony.

Dr. Shrode testified that the cause of death was "homicide suffocation." Tr. Vol. 23 at 243. Dr. White's conclusions did not take into account all the trial testimony. Robinson testified that Carliss Williams taped the victim's mouth, arms, and legs. Tr. Vol. 22 at 220-24; Vol. 23 at 38. Carliss Williams, however, did not put a plastic bag on the victim's head. Tr. Vol. 23 at 38-39. Robinson later returned home to find Petitioner putting a plastic bag over the victim's head. Tr. Vol. 22 at 234-37. Petitioner has not shown that calling an expert, especially one which the state habeas court found not to be credible, would have more effectively challenged the prosecution's arguments about intent than what trial counsel actually did.

Petitioner again makes much of two inconsistencies between the physical evidence and the prosecution's case. First, she once more contends that the scissors were only meant to cut bandages and could never slice through skin, so that Petitioner could not use them to extract a baby from the victim. Second, Petitioner alleges that the whole prosecution theory is flawed because Petitioner would have no need to cut the baby from the victim when baby Ray was born four days before. These statements are true. However true they maybe, they are dependant on Petitioner's knowledge before the crime of the baby's birth and the intended use of the scissors. The testimony and evidence suggested that Petitioner may have thought the baby was still *in utero* and that she would need to use the scissors to extract it. While evidence now shows that belief to be wrong, it does not change the fact that Petitioner made the statements before the abduction and murder.

Even so, trial counsel attacked that evidence at trial: "They want you to believe that, for some reason, that she was going to use a pair, I guess, of blunt-nose nursing scissors to cut a baby out of a woman who already had a baby, which makes absolutely no sense." Tr. Vol. 24 at 126. In the end, the prosecution did not argue that Petitioner killed or even was exactly going to kill the victim with the scissors. The prosecution made no suggestion that the victim died by that means. What the statements showed was that Petitioner intended to get a baby by whatever means, and discussed, almost casually, incurring gross violence on the victim. While not showing directly whether Petitioner planned on killing the victim, it inferentially showed that she had little regard for the victims's life. Trial counsel challenged that theory. Petitioner has not shown that counsel was not effective in that effort or that it prejudiced her defense. The state habeas court was not unreasonable in denying this claim. *See* 28 U.S.C. § 2254(d)(1).

F. Inadequate Jury Selection Questioning (claim 1(f))

Petitioner complains that trial counsel rendered ineffective assistance during jury selection. Petitioner did not properly exhaust this claim. First, Petitioner faults counsel for agreeing with the prosecution to summarily dismiss 150 of the 184 potential jurors. The record provides no indication of why the parties summarily dismissed the potential jurors. When the parties dismissed the prospective jurors, they had the benefit of having reviewed their jury questionnaires. Respondent speculates that the potential jurors' answers may have disqualified them from jury service. Also, Respondent hints that maybe some of the jurors were exempt from jury service or did not show up for voir dire. Petitioner has not secured affidavits from trial participants that would shed light on why these jurors were not questioned. Petitioner bears the burden on habeas review of proving the validity of her allegations. Petitioner has not provided this Court sufficient information to determine deficient performance. Also, as Petitioner has not shown that the pretrial procedure did not preserve her rights and that she did not receive a fair and impartial jury, she cannot show *Strickland* prejudice. Petitioner does not provide the Court enough information to question whether the excusal of a significant portion of the jury pool violated her constitutional rights.

Petitioner also complains that trial counsel inappropriately questioned potential jurors. When discussing the possible range of punishments Petitioner could receive, trial counsel stated that he personally would prefer the death penalty to a life sentence because life was "a little more horrible." Tr. Vol. 13 at 90. Petitioner alleges that the comment confused potential jurors into thinking she would prefer a death sentence. The effect of trial counsel's comment, however, is open to interpretation. A juror could wish to punish Petitioner as harshly as possible, and then favor a life sentence. Petitioner fails to acknowledge that immediately after making that statement, trial counsel told the juror that they possessed discretion to answer the special issues. Tr. Vol. 13 at 90.

In a footnote Petitioner criticizes a "bizarre comment" that trial counsel made by stating "I like blonds. Boy, it's going to be bad." Tr. Vol. 5 at 64. While possibly unprofessional and boorish, Petitioner has not shown that the comment alone constituted ineffective assistance under the *Strickland* cases. Petitioner has not shown a right to habeas relief on this issue. Even so, "[t]he comments of . . . counsel during voir dire were surely a distant and convoluted memory by the time the jurors began their deliberations on [her] sentence." *Penry*, 532 U.S. at 802.

G. Failure to Inform Petitioner of her Consular Rights (claim 1(g))

Petitioner complains that trial counsel breached a duty to inform her about her consular rights. As previously noted, the record shows mixed statements about Petitioner's nationality. However, trial counsel apparently knew that Petitioner was a foreign national. In a pre-trial hearing, trial counsel stated that "Ms. Carty is not from the United States." Tr. Vol. 3 at 12. Trial counsel, however, did not inform Petitioner that she had a right to consular assistance.

Even if trial counsel should have informed Petitioner of her consular rights, her allegations of prejudice are speculative. When given the opportunity to announce her foreign citizenship, Petitioner previously claimed that she was a United States citizen. The State gave her an opportunity to avail herself of the protections afforded non-citizens. Petitioner was not forthcoming with her nationality and thus refused to avail herself of the Vienna Convention. She now asks the Court to assume that, had trial counsel informed her of her consular rights, she would have set in motion a series of decisions that would have resulted in her being represented in the same manner as suggested on federal habeas review. Nothing contemporaneous with trial suggests that she would have done so.

Even by couching this issue in the context of an ineffective-assistance-of-counsel claim, Petitioner cannot avoid the fact that the Supreme Court has refused to craft a remedy for Vienna Convention violations. Even if trial counsel should have informed Petitioner of her consular rights, and assuming that she would have exercised them, Petitioner must show that it would have made a difference at trial. While making broad claims about the supervisory role consular authorities may have played and speculative arguments that foreign governments could have persuaded Harris County to drop the death penalty as a sentencing option, Petitioner assumes that consular assistance would have resulted in the same kind of representation she has been afforded on habeas review. At its essence, Petitioner's claim is that consular notification would have rectified all the errors she attributes to trial counsel. In that respect, this claim of ineffective assistance is in effect a claim of cumulative error. This Court, therefore, will assume that the substance of this claim would result in the same outcome as her cumulative ineffective assistance claim that the court will discuss later.

H. Failure to Object (claim 1(h))

Petitioner claims that trial counsel erred by not making several objections at trial. This Court's review, however, does not show constitutional error. For instance, Petitioner complains that the trial court improperly defined certain terms to jurors during jury selection. The Court has already found no constitutional error in those comments and definitions. For the same reasons discussed above, trial counsel's performance in that regard does not amount to *Strickland* error.

Additionally, Petitioner complains that trial counsel should have objected during the prosecution's opening statement. In outlining the evidence that would come before the jury, the prosecution mentioned that "all sorts of baby items" were found in Petitioner's hotel room. Tr. Vol. 20 at 19. The trial court later barred the prosecution from mentioning items found in the hotel room, Tr. Vol. 21 at 35, and granted a motion to suppress, Tr. Vol. 22 at 12. Even if trial counsel should have objected at that time, significant admissible testimony established that Petitioner had accumulated numerous baby items in anticipation of the kidnapping. Any impact from the prosecution's comments would only be cumulative and would not cause a reasonable probability of a different result.

Petitioner complains that trial counsel did not sufficiently object to the trial court's instructions on accomplice-witness testimony. The trial court let the jury decide whether Josie Anderson, Caston, and Combs were accomplices. The trial court instructed the jury that

> An accomplice, as the term is here used, means anyone connected with the crime charged, as a party thereto, and includes all persons who are connected with the crime by unlawful act or omission on their part transpiring either before or during the time of the commission of the offense, and whether or not they were present and participated in the commission of the crime.

Clerk's Record at 178. If the witnesses were found to be accomplices, "a conviction cannot be had upon the testimony of an accomplice unless the accomplice's testimony is corroborated by other evidence tending to connect the defendant with the offense charged[.]" Clerk's Record at 178. Petitioner argues that trial counsel should have objected that the three were actually accomplices as a matter of law.

The prosecution never indicted those three persons with capital murder and asserted that they were not accomplices because "[t]hey did not participate on the night of the actual offense of the killing of [the victim] or the kidnapping of the baby." Tr. Vol. 24 at 112. Under Texas law, an accomplice as a matter of law is a designation reserved for those who are "susceptible to prosecution for that offense with which the accused in charged." *McFarland v. State*, 928 S.W.2d 482, 512 (Tex.

Crim. App. 1996). Only "if there exists no doubt or the evidence clearly shows that a witness is an accomplice witness as a matter of law then the court is under a duty to so instruct the jury." *Blake v. State*, 971 S.W.2d 451, 455 (Tex. Crim. App. 1998) (quotations omitted). Thus,

> [i]f the evidence presented by the parties is conflicting, and it is not clear whether the witness is an accomplice, the jury must initially determine whether the witness is an accomplice as a matter of fact. If the evidence is conflicting, it is proper to leave the question of whether an inculpatory witness is an accomplice witness as a matter of fact to the jury under instructions defining the term accomplice.

Id.

Here, Josie Anderson, Caston, and Combs did not participate in the home invasion, kidnapping, or killing. As questions existed as to their status as accomplices, the trial court followed Texas law in leaving the matter to the jury. Petitioner has not shown that trial counsel erred in not objecting.

I. Providing an Affidavit in State Habeas Court (claim 1(i))

After Petitioner raised a claim in state habeas court charging trial counsel with having provided ineffective assistance, Mr. Guerinot provided an affidavit describing his efforts to defend Petitioner. Petitioner alleges that this constitutes a breech of lawyer/client privilege and amounts to a constitutional violation. Apart from the fact that she did not properly exhaust this claim, Petitioner provides no precedent that would allow a court to reverse an otherwise-valid conviction or sentence because trial counsel explains his trial strategy. *Strickland* *jurisprudence*, in fact, presumes that trial counsel will have an opportunity to explain his strategic decisions and defend his professional stature against claims of ineptness. Petitioner's claim to the contrary merits no serious consideration.

J. Failure to Withdraw as Counsel (claim 1(j))

Petitioner complains that trial counsel should have withdrawn from the case because he "maintained a demanding workload that prevented him from properly representing Carty[.]" (Docket Entry No. 1 at 106). Petitioner did not properly exhaust this claim. Petitioner points to the fact that trial counsel contemporaneously represented other criminal defendants, including one also charged with capital murder. Also, trial counsel had other commitments as a city prosecutor and private practitioner. Petitioner complains that trial counsel's other obligations impaired his ability to represent her. The Constitution establishes no standard for the number of defendants one attorney may effectively represent. The *Strickland* inquiry cannot be simply reduced to counting how many clients an attorney has. Petitioner also complains that her uncooperative nature should have forced trial counsel to withdraw from representation. If a defendant could force federal habeas relief through past recalcitrance and stubbornness, no defendant would aid in her own defense. This claim, while providing some information into the efforts trial counsel provided, does not itself state a ground for federal relief.

K. Cumulative Effect of Trial Counsel's Representation (claim 1(k))

Petitioner alleges that the sum of the errors she attributes to trial counsel constitute a violation of her constitutional rights, regardless of whether they merit habeas relief individually. Petitioner has made numerous allegations of how trial counsel could have defended her rights in a manner different from what occurred at trial. The touchstone of Strickland jurisprudence, however, is whether a defendant receives all the process she is due; that is, whether she received a fair trial. *See Strickland*, 466 U.S. at 684 ("[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial."). This Court's review of the trial record, the law, and the voluminous post-conviction pleadings suggests that Petitioner's trial met constitutional norms.

This Court has already found that each of Petitioner's allegations taken severally do not demand habeas relief because Petitioner has not met the AEDPA standard (when applicable) and has not shown that federal law otherwise questions the integrity of her conviction and sentence. *See Wilson v. Cockrell*, 70 F. App'x 219, 229-30 (5th Cir. 2003) ("[A]bsent specific deficiency and prejudicial performance, there can be no cumulative ineffective assistance of counsel."). Viewing the whole of trial counsel's representation does not suggest a shocking deviation from what the Constitution expects of attorneys. This by no means implies that trial counsel's efforts were exceptional. Federal review eschews the 20/20 hindsight that time provides when evaluating an attorney's efforts. *See Strickland*, 466 U.S. at 689 ("[F]air assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight[]"). The Court looks at counsel's efforts in a contemporaneous light and, especially in this case, with a full view of the highly inculpatory case against and general unhelpfulness of the client.

Considering the cumulative effect of what an attorney should have done demands a cumulative review of *Strickland* prejudice. Trial testimony showed that

Petitioner was deceptive, but more than that, manipulated others to accomplish her selfish desires. The errors Petitioner imputes to trial counsel cannot blur the fact that Petitioner threw herself into the drug world, that she was recruited to inform the police of criminal activity because of her integration into that culture, but was soon jettisoned as a potential asset when she would not cease her own criminal activity. Petitioner then for years used her brief – and soon disgraced – status as a government informant to cloak herself with the appearance of employment, credibility, and lawfulness. Petitioner repeatedly manipulated her boyfriend/husband, relying on phantom pregnancy to rekindle their relationship. When that ultimately failed, Petitioner recruited a gang of thugs to make it appear her stories were true.

Petitioner's expressions to her conspirators were of the most callous nature, threatening unimaginable harm on a new mother, and she now seeks protection in the fact that her vicious threats were toothless and dramatized. Petitioner concocted a story to lure her co-conspirators into helping her steal a baby, promising them drugs and money that they would not be able to recover from the innocent victims. Petitioner oversaw a violent home invasion, one in which she gave the unfulfilled order to kill. Petitioner then kidnapped a young mother and her newborn. Later, she stood before the crying mother while holding the child. Petitioner directed the others to leave the young mother in the trunk for hours. When they were gone, Petitioner apparently smothered the victim with a grocery bag. Petitioner then hoped to hide her crime by dumping or burning the corpse. No one would carry out her orders. From the start, Petitioner was not a sympathetic defendant.

Petitioner was also not a helpful one. Petitioner now seeks protection through international law based on her status as a foreign national, but claimed United States citizenship when arrested. Petitioner was uncommunicative with trial counsel. Petitioner, in fact, instructed her attorneys not to speak with some of the same witnesses that she now faults them for not interviewing. The trial record shows that the judge admonished Petitioner for her repeated guffaws and negative expressions during witness testimony. Trial counsel, who had represented many capital defendants in the past, described Petitioner as his most obstinate client. Petitioner did not help her case, but now criticizes efforts to circumvent her stubbornness.

The jury would take note of the fact that Petitioner did not assume responsibility for her actions. Petitioner's federal petition does not raise an actual innocence claim, but her construction of the facts and the flow of her arguments assumes that nothing linked her to the victim's murder. She has made little effort, however, to reconcile the non-conspirator testimony – especially that affirming that she said she was pregnant. At the punishment phase and now, Petitioner does not explain why she did the things the evidence establishes, but selectively attacks evidence to create a facade of innocence. The presumption of innocence, however, does not survive the finality of a conviction. Once the jury found Petitioner guilty beyond a reasonable doubt, they could look most unfavorably on punishment-phase protestations that she did no wrong.

Against that background, trial counsel made an imperfect effort to avoid conviction and death. But the Constitution does not require perfection in trial representation. *See Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986); *Lutwak v. United States*, 344 U.S. 604, 619 (1953). Trial counsel secured an investigator and mental-health expert who he used adequately, if not perfectly. Trial counsel's cross-examination reveals an intimate familiarity with the factual record and counsel effectively exposed the biases and credibility problems inherent in the State's witnesses. In the punishment phase, trial counsel went against his client's wishes and secured the presence of favorable witnesses, even when the witnesses themselves (such as Petitioner's own daughter) did not want to testify. Counsel made forceful arguments in Petitioner's favor. Those arguments do not differ in mitigating thrust, but only in depth, from the material Petitioner has gathered after trial.

Counsel could have done more, though the same could be said in nearly every trial. Petitioner "has not demonstrated error by trial counsel; thus, by definition, [Petitioner] has not demonstrated that cumulative error of counsel deprived [her] of a fair trial." *Miller v. Johnson*, 200 F.3d 274, 286 n.6 (5th Cir. 2000). What Petitioner has claimed that counsel could have done better, when viewed in the aggregate, does not call into question the fundamental fairness of her conviction and sentence. *See Yohey v. Collins*, 985 F.2d 222, 229 (5th Cir. 1993) (explaining that, because certain errors were not of constitutional dimension and lacked merits, the petitioner "presented nothing to cumulate"). Petitioner's cumulative ineffective-assistance argument fails.

VI. Cumulative Error (claim 6)

Petitioner also complains that the whole of errors in her trial, even if not affording viable grounds for relief individually, aggregate into a due process violation. "The cumulative error doctrine provides relief only when the constitutional errors committed in the state court so 'fatally infected the trial' that they violated the trial's 'fundamental fairness.' *Spence v. Johnson*, 80 F.3d 989, 1000 (5th Cir. 1996) (quoting *Derden v. McNeel*, 978 F.2d 1453, 1457 (5th Cir. 1992)). "[F]ederal habeas corpus relief may only be granted for cumulative errors in the conduct of a state trial where (1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors 'so infected the entire trial that the resulting conviction violates due process.'" *Derden*, 978 F.2d at 1454 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)); *see also Turner v. Quarterman*, 481 F.3d 292, 301 (5th Cir. 2007). "In order for cumulative error analysis to apply, [a defendant] must have something to cumulate." *United States v. $9,041,598.68*, 163 F.3d 238, 253 (5th Cir. 1998). For the reasons more fully discussed with respect to her claim of cumulative ineffective assistance, Petitioner has not shown that error infected her trial with fundamental unfairness. While Petitioner possibly did not receive a perfect trial, she had one that complied with constitutional requirements. Petitioner's cumulative error claim is denied.

PETITIONER'S EVIDENTIARY HEARING REQUEST

Petitioner asks this Court to hold an evidentiary hearing. (Docket Entry No. 33). Petitioner specifies four witnesses that she would like to call at an evidentiary hearing: trial counsel Mr. Guerinot, trial counsel's investigator John Castillo, assistant district attorney Neelu Sachdeva who provided a federal affidavit describing the state habeas process, and reporter David Rose (a newspaper reporter to whom Mr. Guerinot apparently told in 2007 that he spoke with Mathis and Corona before trial). She also generally states that she would "potentially [call] other affiants whose statements are included in Carty's habeas filings." (Docket Entry

No. 33 at 13). Petitioner's proposed evidentiary hearing seemingly focuses on two issues: (1) the exhaustion of the claims raised in her third response and (2) ineffective assistance of trial counsel.

This Court has already discussed the importance of the assistant district attorney's testimony. Even assuming that she could show that the affidavit was not true and that an agreement existed between the parties to allow a state habeas court filing, she has not suggested any further inquiry that would show an agreement to allow tardy amendment, that the parties could even stipulate to such an agreement, and that the Texas court thus considered her new claims to be before them. Petitioner has not shown that examination of Neelu Sachdeva would change this Court's ruling on exhaustion and has not proposed any other witness who would provide useful testimony in that regard. Petitioner has not shown that an evidentiary hearing is necessary to determine the legal question of the exhaustion of remedies.

With regard to her claim in ineffective assistance, the AEDPA provides stringent limits on this Court's ability to hold an evidentiary hearing. "Congress has decided that a habeas applicant must jump a high hurdle before a federal court can grant an evidentiary hearing[.]" *Oliver v. Quarterman*, 254 F. App'x 381, 391 (5th Cir. 2007). The AEDPA creates a threshold that a prisoner must pass before an evidentiary hearing becomes available: a prisoner must not have "failed to develop the factual basis of a claim in State court proceedings," 28 U.S.C. § 2254(e)(2), unless showing that narrow exceptions apply. A petitioner fulfills this requirement by showing diligence in developing constitutional claims in state court. *See Williams v. Taylor*, 529 U.S. 420, 434 (2000); *Robison v. Johnson*, 151 F.3d 256, 268 (5th Cir. 1998) (holding that "a petitioner cannot be said to have 'failed to develop' a factual basis for his claim unless the undeveloped record is a result of his own decision or omission"). The claims that Petitioner wishes to examine in an evidentiary hearing are largely the ineffective-assistance-of-counsel claims she raised late in the state habeas process. This Court has already found that she did not present those claims in a procedurally proper manner in state court. The tardiness with which she tried to assert those claims in state court detracts from a finding that she diligently developed them. In addition, Petitioner has not shown that the requested evidentiary hearing relies on fact or law previously unavailable to her.

Even complying with 28 U.S.C. § 2254(e)(2) does not entitle a petitioner to an evidentiary hearing. "[O]vercoming the narrow restrictions of § 2254(e)(2) does not guarantee a petitioner an evidentiary hearing; it merely opens the door for one; once a petitioner overcomes the obstacles of § 2254(e)(2), under Rule 8 of the Rules Governing § 2254 Cases, the district court retains discretion over the decision to grant an evidentiary hearing." *Murphy v. Johnson*, 205 F.3d 809, 815 (5th Cir. 2000). Federal law then leaves "[t]he decision whether to conduct an evidentiary hearing ... to the sound discretion of the district court[.]" *Barrientes*, 221 F.3d at 770.

This Court has found that the claims which Petitioner seeks to support through an evidentiary hearing are without merit. While Petitioner apparently seeks to show through the evidentiary hearing that trial counsel provided deficient performance, the record before the Court is sufficient to show that she has not met the *Strickland* standard. In particular, even assuming that an evidentiary hearing would reveal that trial counsel's account of his performance was flawed and that, in all regards, he performed deficiently, Petitioner has not shown how an evidentiary hearing would develop the critical question of *Strickland* prejudice. The Court has found that Petitioner has not shown *Strickland* prejudice with respect to each of her claims. Petitioner does not show that an evidentiary hearing would change that analysis. Insofar as Petitioner asserts that other witnesses could be called, she has not provided a sufficiently detailed request for an evidentiary hearing. The Court will deny Petitioner's motion for an evidentiary hearing.

CONCLUSION

This Court has exhaustively reviewed Petitioner's grounds for relief. The Court finds that Petitioner has not shown that constitutional error infected her trial. For the reasons outline above, the Court grants summary judgment in Respondent's favor, denies Petitioner's motion for an evidentiary hearing, denies Petitioner's federal habeas petition, and dismisses this case with prejudice.

The Clerk shall enter this Order and provide a copy to the parties.

Signed on this the 30th day of September, 2008, at Houston, Texas.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX E

ENTERED December 16, 2008

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

LINDA ANITA CARTY, §
§
Petitioner, §
§
VS. § Civil Action
§ No. 06-614
NATHANIEL QUARTERMAN, §
Director, Texas Department §
of Criminal Justice, Correctional §
Institutions Division, §
§
Respondent. §

ORDER

On September 30, 2008, this Court entered a Memorandum and Order denying Petitioner Linda Anita Carty's federal petition for habeas corpus relief. (Docket Entry No. 36). Petitioner filed a timely motion for post-judgment relief under Fed.R.Civ.P. 59(e). (Docket Entry No. 38). This Court denied her Rule 59(e) motion. (Docket Entry No. 42). On December 15, 2008, Petitioner filed a notice of appeal (Docket Entry No. 43) and a motion for a certificate of appealability ("COA") (Docket Entry No. 44). Before Petitioner's appeal may proceed, this Court must determine whether to certify any issues for consideration by the Court of Appeals for the Fifth Circuit. *See* Fed.R.App.P. 22(b) ("If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability of state why a certificate should not issue."). Federal law only allows appellate consideration of habeas claims after an inmate makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In practice, an inmate's burden depends on whether she seeks to appeal a procedural or substantive determination:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. . . . When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). Other factors, however, weigh into the COA analysis, including whether the case is a capital one, *Ramirez* v. *Dretke*, 398 F.3d 691,694 (5th Cir. 2005), and whether the issues simply "deserve encouragement to proceed further." *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003) (citing *Slack*, 529 U.S. at 484). Unless the petitioner meets the

COA standard, "no appeal would be warranted." *Slack*, 529 U.S. at 484.

Petitioner's COA motion challenges this Court's adjudication of her claims, disputing the Court's resolution of most procedural determinations and the substantive finding that she did not merit habeas relief. As a threshold issue, the Court found that Petitioner failed to exhaust many of her claims because she did not provide the state courts an adequate opportunity to resolve their merits. Given the belated and procedurally incorrect manner in which Petitioner raised her claims, the Court is confident that she did not exhaust her claims. Nonetheless, given the complexity of the record and the intricacies of Texas habeas law, the Court finds that the exhaustion issue "deserve[s] encouragement to proceed further." *Miller-El*, 537 U.S. at 336. The Court, therefore, will grant a COA on the question of whether Petitioner sufficiently exhausted state court remedies.

Because this Court reached the merits of Petitioner's habeas claims in the alternative, granting a COA on threshold procedural issues will only benefit her if the Court also authorizes appellate consideration of some substantive claims. Petitioner asks this Court to certify appellate review of many claims, but she emphasizes most strongly that her attorneys did not adequately represent her at trial. The Court exhaustively reviewed the merits of all Petitioner's claims, despite their procedural posture. Importantly, the Court extensively reviewed her ineffective-assistance-of counsel claims and found that she had not shown deficient performance by her attorneys or actual prejudice. Petitioner's arguments for a COA focus most strongly on whether trial counsel's efforts fell below constitutional norms without convincingly refuting the prejudice determination.

Nonetheless, some claims Petitioner raises are sufficiently novel and complex to warrant further review. In particular, the Court will grant a COA on the following two claims: (1) trial counsel should have informed her boyfriend/husband of possible spousal immunity and (2) trial counsel should have presented more mitigating evidence at the punishment phase.

The Court, therefore, will certify an appeal as indicated above. The Court denies Petitioner a COA in all other respects. If Petitioner wishes to challenge her other claims on appeal she must seek a COA from the circuit court.

The Clerk shall enter this Order and provide a copy to the parties.

Signed on this the 16th day of December, 2008, at Houston, Texas.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE